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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~884~~. 621

THE PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF IN ERROR,

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED OCTOBER 3, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 984.

THE PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF IN ERROR,

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

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a *Transcript on Writ of Error.*

In the Circuit Court of the United States for the District of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY, Defendant. } No. 2845.

1 *Complaint.*

In the Superior Court, County of Fresno, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

Plaintiff avers that the defendant, a corporation duly incorporated under the laws of the State of California, is indebted to plaintiff in the sum of $25,950.50, State and county taxes for the fiscal year 1881, with five per cent. added for the non-payment of such taxes and 50 cents costs of collection to date.

Plaintiff demands judgment for said several sums, and prays that an attachment may issue in form as prescribed in section five
2 hundred and forty of the code of civil procedure.

E. HALL,
Tax Collector of Fresno County.
D. S. & L. S. TERRY,
Attorneys for said Tax Collector.

Endorsed: No. 374. Superior court, Fresno county. The People of the State of California *vs.* The Central Pacific Railroad Company. Complaint. Filed 22 April, 1882. A. M. Clark, clerk.

3 *Summons, Return to.*

OFFICE OF THE SHERIFF OF
THE CITY AND COUNTY OF SAN FRANCISCO.

I hereby certify that I received the annexed summons on the 26th day of April, A. D. 1882, and personally served the same on the 27th day of April, A. D. 1882, upon the Central Pacific Railroad Company (a corporation), the therein named defendant, by delivering to E. H. Miller, Jr., secretary of said defendant, personally, in the city and county of San Francisco, a copy of said summons, attached to a copy of the complaint in said action therein named.

Dated at San Francisco, this 27th day of April, 1882.

JOHN SEDGWICK, *Sheriff,*
By W. T. HAVERLY, *Deputy Sheriff.*

Fees, $1.75.

4 *Summons.*

In the Superior Court of the County of Fresno, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

Action brought in the superior court in and for the county of Fresno, State of California, and the complaint filed in the office of the clerk of said county.

The people of the State of California send greeting to The Northern Railway Company, Defendant:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the superior court of the county of Fresno, State of California, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county,
5 or, if served elsewhere, within thirty days.

The said action is brought to recover the sum of twenty-five thousand nine hunderd and fifty and $\frac{50}{100}$ ($25,950.50) dollars, State and county taxes for the fiscal year 1881, with per cent. added for the non-payment of such taxes, and fifty cents costs of collection to date.

And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will cause your default to be entered and take judgment against you for said sum of $25,950.50, together with five per cent added and fifty cents as aforesaid.

Given under my hand and the seal of the superior court in and for the county of Fresno, State of California, this 22d day April, in the year of our Lord one thousand eight hundred and eighty-two.

[L. S.] A. M. CLARK, *Clerk.*

6 Endorsed: Filed 1st May, 1882. A. M. Clark, clerk. By J. H. Daly, deputy clerk.

7 *Answer.*

In the Superior Court of the County of Fresno, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY, Defendant. } No. 374.

Now comes the defendant, and answering the complaint of plaintiff herein—

I.

Denies each and every allegation in said complaint had, made, or contained. Denies that the defendant now is, or since 1864 has been, a corporation under the laws of the State of California, or otherwise than as hereinafter set out. Denies that it is indebted to the plaintiff

in any sum whatever for State or county taxes for the fiscal year 1881, or for percentage, costs of collection, or otherwise. Denies that any assessment for said fiscal year was ever made against it, or against its property, or any property in its possession or under its control.

Defendant refers to and makes part of this subdivision the matters and things stated in subdivisions 2 to 36, inclusive, of this answer.

8 And for further and separate answer, defendant avers:

II.

Defendant a corporation—Its place of business—Line of road.

That it is a corporation existing under the laws of the United States and of the State of California (as will hereafter more fully appear), and as such has been for many years past, and still is, the owner (except in the respect hereinafter stated) of a line of railroad known as the Central Pacific railroad, extending from the Pacific Ocean, across the State of California and the State of Nevada, to Ogden, in the Territory of Utah. That the principal place of business of defendant now is, and for many years last past has been, in the city of San Francisco, State of California. That a great number of its stockholders now are, and ever have been, citizens of the United States and residents of said State of California, while other of its stockholders now are, and ever have been, citizens of the United States and residents of States other than the State of California.

III.

Length of road in the several counties.

That the total length of said railroad in said State of California is 602.22 miles, and the length thereof in the respective counties through which it passes is as follows: In the county of San Francisco, 4 miles; in the county of Alameda, 83.52 miles; in the county of Santa Clara, 8.50 miles; in the county of San Joaquin, 56.75 miles; in the county of Sacramento, 41 miles; in the county of Placer, 112.75 miles; in the county of Nevada, 30.25 miles; in the county of Sierra, 2.15 miles; in the county of Yuba, 15.87 miles; in the county of Sutter, 10 miles; in the county of Butte, 45 miles; in the county of Tehama, 40.24 miles; in the county of Shasta, 18.80 miles; in the county of Stanislaus, 22.63 miles; in the county of Merced, 36.75 miles; in the county of Fresno, 61.06 miles, and in the county of Tulare, 12.65 miles. That the length of said road, from the city of Sacramento, through the counties of Sacramento, Placer, Nevada, and Sierra, to the eastern boundary of said State, is 186.25 miles.

IV.

Purpose of the formation of the C. P. R. R. Co. of Cal.

That on the 28th day of June, 1861, a corporation was formed and organized under the laws of the State of California, under the

corporate name of The Central Pacific Railroad Company of California; that said corporation was formed for the purpose of constructing, owning, and operating a line of railroad and telegraph, commencing at the city of Sacramento in said State, and running thence through the counties of Sacramento, Placer, Sierra, and Nevada, to the eastern boundary of said State; that said corporation was formed in the expectation that its proposed railroad, when constructed, constitute part of a line of railroad extending from the Missouri river to the Pacific Ocean, which line was then supposed was about to be constructed under the legislative supervision and authority of the Government of the United States, and which line of railroad was afterwards so constructed.

V.

Act of Congress of July 1st, 1862—Pacific R. R. act.

That on or about the 1st day of July, 1862, the Government of the United States undertook to construct, or to cause to be constructed, a line of railroad from the Missouri river to the Pacific Ocean, and to that end Congress passed an act entitled "An act to aid in the construction of a railroad from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," to which act defendant here refers by title, and makes it a part of this answer. (See United States Statutes, vol. 12, page 489.)

That by said act certain persons therein named were made and erected into a corporation, under the name and style of the "Union Pacific Railroad Company," which corporation was authorized and empowered to construct, own, and operate a line of railroad and telegraph from the Missouri river to the Pacific Ocean.

VI.

Like privileges and immunites to the Central and Union Pacific Companies.

That to facilitate the construction of said road and telegraph line, the Government of the United States, by said act of Congress, adopted the said Central Pacific Railroad Company of California as its instrument or agent, and conferred upon it the same powers, and clothed it with the same privileges and immunities as it
9 conferred upon and clothed the said Union Pacific Railroad Company with, except that said Central Pacific Railroad Company of California was to commence the construction of said railroad at the Pacific Ocean and build east until it met the said Union Pacific railroad building west.

VII.

Act of Congress of July 2d, 1864.—Amendment.

That on or about the 2d day of July, 1864, Congress passed an act entitled "An act to amend an act entitled An act to aid in the construction of a railroad and telegraph line from the Missouri river

to the Pacific Ocean and to secure to the Government of the United State the use of the same for postal, military, and other purposes, approved July 1, 1862"; to which act defendant here refers by title, and makes the same a part of this answer. (See 13 United Statutes at Large, page 356.)

VIII.

Intent of Congress in passing acts of 1861 and 1864.

That the intent and purposes of Congress in passing said acts was to secure the completion of a railroad from the Missouri river to the Pacific Ocean, and to secure the use thereof for all time to come to the Government of the United States for the transportation of its mails, troops, munitions of war, and public stores.

IX.

C. P. R. R. Co. accepts terms offered by Congress.

That said Central Pacific Railroad Company of California filed in the Department of the Interior its acceptance of the terms and conditions of said act of Congress of July 1st, 1861, within the time therein designated.

X.

Transfer of rights to W. P. R. R. Co.

That on or about the 31st day of October, 1864, said Central Pacific Railroad Company of California sold and assigned all its rights under the aforesaid acts to a corporation then existing under the laws of the State of California, and known as the Western Pacific Railroad Company, so far as said rights related to the construction of said railroad and telegraph between the cities of San Jose and Sacramento, in said State of California; which assignment was ratified and confirmed by the United States by an act of Congress passed on the 3d day of March, 1865, entitled "An act to amend an act entitled An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July 1st, 1862, and to amend an act amendatory thereof, approved July 2d, 1864"; to which act defendant here refers by title, and makes the same a part of this answer. (See 13 United States Statutes at Large, page 504.)

XI.

Railroad completed.

That the said line of railroad from the Pacific Ocean to Ogden, in Utah Territory, was completed and put in operation in 1869, and has been in operation from that time until the present, and still is in operation, and that the whole of the railroad mentioned in the said acts of Congress have long since been completed and is now, in accordance with the spirit and intent of said acts of Congress, oper-

ated as one continuous line from the Missouri river to the Pacific Ocean, and is so operated and maintained for the uses and purposes mentioned in said acts; and that the corporations in charge thereof, including this defendant, are agents of the Federal Government charged to carry out the purposes of said Government as expressed in said acts of Congress.

XII.

Consolidation.

That in August, 1870, acting under the said acts of Congress, said Central Pacific Railroad Company of California, and the said Western Pacific Railroad Company formed themselves into one corporation under the name of The Central Pacific Railroad Company, which company is the defendant herein, and, as the agent and instrument of the Federal Government, has, from the completion of said railroad as aforesaid until the present time, owned (except in the respect hereinafter stated) and operated said railroad under and by virtue of said acts of Congress, and for the uses and purposes therein mentioned.

10

XIII.

Indebtedness secured by mortgage.

That the bonds loaned by the United States under said acts of Congress of July 1st, 1862, and July 2d, 1864, to said Central Pacific Railroad Company of California, were about twenty-seven millions of dollars. That no part of said loan, except the accruing interest thereon, has been paid, but that the same now is, and for more than five years last past has been, outstanding. That to secure the payment of the same, the United States now have, and ever since the issue of said bonds have had, a lien by mortgage upon the said railroad, its rolling-stock, fixtures, and franchises. That by said act of Congress of July 2d, 1864, said Central Pacific Railroad Company of California was authorized to issue its bonds in an amount equal to said United States bonds, and to secure the payment of the same by a mortgage upon its said road, telegraph, franchises, and properties. That under the provisions of said act, said bonds, to the amount of more than five thousand dollars per mile, were issued before the first day of January, 1875. That the payment of the same was secured by a mortgage made by said company upon its said railroad, rolling-stock, and franchises. That said bonds are unpaid and outstanding, but are not yet due, and that the same now are, and ever since their issue have been, secured by the mortgage aforesaid. That many of said bonds now are and ever have been owned by citizens and residents of the State of California, while other of said bonds now are and ever have been owned by citizens of the United States residents of States other than California.

XIV.

Property belonging to the U. S. exempt from taxation.

That under said constitution all property belonging to the United States is exempt from taxation.

XV.

Assessment by State Board of Equalization.

That on the 2 day of May, 1881, the State Board of Equalization of the State of California, pretending to act under and by virtue of the powers conferred upon it by section 10 of article XIII of the constitution of the State of California, did make a pretended assessment for the purposes of taxation for the fiscal year of said State then next ensuing upon the franchise, roadway, road-bed, rails, and rolling-stock of said railroad of defendant. That said pretended assessment was made separately upon the franchise, roadway, road-bed, rails, and rolling-stock of said railroad, and was then and there so entered upon the minutes of said board; and that said assessment is the assessment upon which the several taxes mentioned in the complaint herein are based; that no other assessment than the aforesaid was ever made of said property, or any part thereof, for said fiscal year.

XVI.

Failure of State board to transmit assessment.

That the State Board of Equalization never did at any time transmit said pretended assessment or any assessment of said property, or any part thereof, to the assessor, or to any of the authorities of said county, and never at any time caused the same to be entered upon the assessment roll of said county for said fiscal year, or for any other year, nor has said pretended assessment, or any part thereof, or any assessment against said defendant or said property, or any part thereof, ever been entered upon or made part of any assessment roll, book, or delinquent list, in or for said county.

XVII.

State board never apportioned assessment.

Defendant avers, upon its information and belief, that neither said pretended assessment nor any assessment against defendant in respect to said property, or any part thereof, was ever entered upon any assessment roll or book of said county of Fresno, nor upon any delinquent list of said county, nor was any entry relative to the action of the said State Board of Equalization in respect to the assessment or apportionment of said property of defendant, or any part thereof, ever entered upon said assessment roll or book, except a letter of the State Board of Equalization, addressed to the assessor of said county, and that said letter did not contain said assessment or any part thereof, nor a copy of said assessment or any part thereof, nor did it contain any apportionment thereof, as provided for in section 10 of article XIII of the constitution of the State of California, hereinbefore referred to, or otherwise.

11 XVIII.

No assessment was ever made or entered on the assessment roll.

Defendant, upon information and belief, avers that neither said pretended assessment nor any assessment against this defendant, or any other person or persons, in respect to the said property, or any part thereof, was ever entered upon any assessment roll or book of said county of Fresno, nor upon any delinquent list of said county, nor was any entry relative to the action of the said State Board of Equalization in respect to the assessment or apportionment of said property of defendant, or any part thereof, ever entered upon said assessment roll or book, except the said letter of the said State Board of Equalization. That said letter was copied by the assessor of Fresno county on or about the 1st day of June, 1881, upon the assessment. That upon said assessment roll opposite said letter is entered in figures $1,526,500, and opposite said figures, under the head of taxes due, is entered in figures $27,354.25. That the same entries, and no others, appear upon the delinquent list of said county for said fiscal year. That as defendant is informed and believes, and upon such information and belief charges the truth and fact to be, that there are in respect to the said property of defendant, and in respect to petitioner, no other or further entries upon any assessment roll, book, or delinquent list of said county.

XIX.

State board pretended to assess the whole of said property to defendant.

That the State Board of Equalization, in making the said pretended assessment, pretended to assess to and against defendant the whole of said railroad, roadway, road-bed, rails, rolling-stock, and franchises, and failed to deduct therefrom the value of the mortgages given and existing as aforesaid thereupon to secure the indebtedness of said company to the United States and to the holders of said bonds.

XX.

State board did not treat said mortgage as an interest in the property.

That in making said pretended assessment the said State Board of Equalization did not deem or treat said mortgages as an interest in said property, but did assess the whole of said property to the defendant in the same manner it would have done had there been no mortgage thereon.

XXI.

Pretended assessment and apportionment made before any other asessments in the State.

That the time the said pretended assessment was made and said pretended apportionment was made by the State Board of Equalization no assessment book or roll for the said fiscal year had been

completed or was in existence, nor had a single assessment or valuation for the purposes of taxation for said fiscal year been ascertained or fixed as provided by law or otherwise, and that said board, in making said valuation and apportionment, neither did nor could exercise any of the powers relative to the equalization of values for the purposes of taxation.

XXII.

Authority exercised by State board violates provisions of Fourteenth Amendment.

That under the constitution of the State of California the board of supervisors of the several counties of the State constitute boards of equalization for their respective counties, whose duty it is to equalize the valuation of the taxable property in the county, except the franchise, roadway, road-bed, rails, and rolling-stock of railroads operated in more than one county of the State, and that to such boards the owners of all property, except as above stated, have the right and privilege to apply for the correction of the assessed values of such property, and have the right and privilege of a hearing before the said local boards of equalization. That by the provisions of the constitution of California, and the laws thereof, this right and privilege, or any right and privilege, to be heard in relation to the said assessment is denied in respect to the property in question. All of which defendant avers is contrary to the provision of the Fourteenth Amendment of the Constitution of the United States.

12

XXIII.

Further violation of Fourteenth Amendment.

That the said State Board of Equalization never at any time, made or had any rule or regulation relative to the assessment of valuation of railway property of any kind, nor never made or had any rule to govern or regulate its proceedings for the exercise of the powers conferred upon it by section 10 of article XIII of the constitution of California.

XXIV.

Further discrimination.

That the power conferred upon the State Board of Equalization by section ten of article XIII of the constitution violates the provisions of said Fourteenth Amendment, for that said section as to such powers is self-executing and complete, and does not provide for personal or other notice to be given to the parties to be affected by the exercise of such power; and does not provide for a full or any opportunity of time, place, or tribunal for such parties to be heard in defense of their rights; and that from, under, and by said provision of the constitution of the State of California the liability of owners of such property to taxation, and the amount thereof, may be fixed without notice or an opportunity to be heard.

XXV.

Further discrimination.

That the provisions of the constitution of the State of California providing for the assessment of railroad property operated in more than one county is in contravention of the provisions of said Fourteenth Amendment of the Constitution of the United States, in this, that it discriminates against the owners of railroad property operated in more than one county, and especially this defendant, in this, that whereas, under section four of said article XIII of the constitution of the State of California, if the owner of other kinds of real property have a mortgage, lien, or incumbrance thereon, he is not liable to assessment or taxation upon such property, nor for the value of his interest in such real estate, over and above the value of such mortgage, lien, or incumbrance; whereas in case of railroad property no such allowance or deduction is made, had or allowed with respect to any mortgage, lien, or incumbrance there may be upon such property.

XXVI.

Further discrimination.

That the defendant and all owners of railroad property, operated in more than one county, by virtue of the provisions of said section ten, of article XIII, which relate to the assessment by the State Board of Equalization of such property, are denied any protection from the laws of the State of California, which—

(*a.*) Require that property shall be taxed in proportion to its value.

(*b.*) Require such proportions to be ascertained by a general law.

(*c.*) Require that before liability be fixed an opportunity to be heard must be given.

(*d.*) Give an appeal from the assessor to boards of equalization.

(*e.*) Require the assessment to be made in the county, and prevent its being made in localities distant from the *situs* of the property.

(*f.*) Which prescribe mode and manner of the assessment.

(*g.*) Which allow deductions for indebtedness secured by mortgage.

And defendant avers that at and before and ever since the adoption of the constitution of California, now in force, there were and are existing under the laws of said State corporations of various kinds formed for the purpose of and actually operating and doing business, and holding and using and operating property in more than one county in said State, and that at all of said times there were and there now are divers natural persons, residents of said State, operating property in more than one county in said State, and that at all of said times there were and now are railroads owned by corporations formed under the general laws of said State which are only operated in one county. That by the provisions of section ten of article XIII of said State constitution persons operating railroads in more than one county in the State have been singled out from

all other persons operating property in more than one county and denied the right, common to all other persons, to appeal for relief from over-valuations of their property by assessors to the local board of equalization and denied the rights and privileges accorded by the laws to all other persons in that respect.

13 XXVII.

System adopted by said board violates rules of equality.

That the State Board of Equalization in making said pretended assessment of the said roadway of defendant did willfully and designedly include in the valuation of said roadway the value of fences erected upon the land of coterminous proprietors; and did willfully and designedly value the said roadway at a greater value than the value of other property similarly situated, and greater than its actual value, upon the ground that such increased valuation should be made because the title of defendant thereto was acquired by condemnation.

That the value of such fences which were not the property of defendant, and the increased value affixed to the roadway by the system adopted by the board, are blended in said pretended assessment, and that there is no mode or means by which such illegal valuations can be separated from those which may be legal.

Defendant, upon its information and belief, avers that the said State Board of Equalization adopted a system of valuation in respect to all the property mentioned and referred to in section 10 of article XIII of the Constitution, which defines the power of said board, which system was by said board intended to and which did operate unequally, and which was intended to and did violate the rule prescribed by said section—that all of such property should be assessed at its actual value. That the system so adopted was applied by the said board in making said pretended assessment of the property of defendant, and in making the assessment of all property in the State over which the pretended authority of said board extended.

That said system was to include within the value of the roadway the value of the fences owned and possessed by coterminous proprietors, and to value said roadway at double its actual value, because the right thereto was acquired by condemnation. That said system relative to the rolling-stock of railroads was to value the same at sixty per cent. above its actual cost when new, and to value such roll-stock at double its actual value. That said system relative to the franchise was to value it at $2,000 per mile, when the actual value, as the board well knows, of said franchise as an entirety did not exceed twenty-five dollars. That said system as to the valuation of other property to be assessed by the said board was to value it at double its actual value. That the said system was by the said board adopted and was by it applied in making all assessments made by it with the intent and purpose wrongfully and unlawfully to cause the persons and property assessed by it to pay double the rate of State and county taxes paid by the owners of property assessed by the

local authorities. And defendant avers, upon its information and belief, that the said board applied the said system in making the pretended assessment against the property upon which the taxes mentioned in the complaint are based. And defendant, upon its information and belief, avers that the said State Board of Equalization, in making said pretended assessment, did not value any of said property at its actual value, but did intentionally, and for the purpose of making defendant pay an unequal proportion of State and county taxes, assess the said property at double its actual value. And defendant avers that the general rule in this State has been to assess property at not over two-thirds its cash or actual value, and that this rule was adopted and acted upon by all local assessors in the State, and by the said State board, except in the exercise of the power conferred by section 10, art. XIII, of the State constitution for said fiscal year, and that all property save that assessed by the said State board under said section has been valued and assessed at one-third less than its actual value, and that the taxes have been collected on valuations so made.

XXVIII.

Defendant's franchise a Federal one.

And defendant, upon its information and belief, avers that under and by virtue of the said several acts of Congress defendant became, and ever since has been, a Federal corporation and has held its franchise and exercised all its corporate powers under the Government of the United States.

XXIX.

Corporate powers in part derived from acts of Congress.

And defendant, upon its information and belief, avers that if by virtue of the several acts of Congress herein referred to it did not become a Federal corporation, yet it holds under the Government of the United States all the corporate powers and franchises granted to it by the said several acts of Congress as the trustee of the said Government, and for the governmental uses and purposes specified in said acts.

XXX.

That the franchise of defendant is not subject to State taxation.

That under and by virtue of the said several acts of Congress hereinbefore referred to the plaintiff was by the Government of the United States selected as the means and instrument of that Government to construct the railroad hereinbefore described, and to keep and maintain the same in repair, to the end that the said
14 Government might, when occasion required, use the same for the transportation of its armies and military stores, and for such other purposes as said Government might, in the execution of its powers, desire to use the same. That the Government of the United States has never given to the State of California the right to lay

any tax upon the franchise, existence, or operations of defendant. That such a tax would hinder and impede the lawful operations of the Government of the United States; would destroy the means and instrument by that Government chosen and selected for the purposes aforesaid, andwould nullify and prevent the enforcement of the said several acts of Congress.

XXXI.

Whole franchise assessed.

That the said pretended assessment made by the State Board of Equalization is upon the whole of the franchises of defendant, and that the said board, in valuing the same, included the value of all the franchises held and corporate powers exercised by defendant under said acts of Congress.

XXXII.

Tax upon the franchise blended with tax upon other property.

That the State Board of Equalization, in making said pretended assessment, included and assessed the franchise of defendant, and in making said pretended apportionment included in the valuation affixed to the property of defendant the value thereof, but that such value is not separately stated in said apportionment, nor upon any assessment roll or delinquent list of said county, but such value is in said pretended apportionment and upon the assessment roll and delinquent list of said county, blended with the values affixed to the roadway, road-bed, etc., and cannot on either be distinguished or separated from such other values, and that the tax upon said franchise is in like manner blended with and cannot be separated from the tax on said roadway, road-bed, etc.

XXXIII.

Valuation excessive.

Than neither the franchise, roadway, road-bed, rails, or rolling-stock were assessed by the State Board of Equalization in said pretended assessment at their actual value, or in proportion to their value, but were wilfully and intentionally assessed greatly in excess and out of proportion to such value, and greatly in excess of and out of proportion to the rate at which all other property in said State is valued, for the purposes of taxation, to wit, one hundred per cent. in excess thereof.

XXXIV.

Sole authority upon which tax is based.

That said pretended assessment is the only assessment of said property of defendant, and the pretended tax, for non-payment of which this action is brought, is founded upon said pretended assessment and upon no other assessment.

XXXV.

County tax not the same in all townships and districts.

The defendant, upon its information and belief, avers that the tax levied by the Board of Supervisors for said fiscal year was not fixed at the same rate in every township and district in said county. And defendant, upon its information and belief, avers that said tax was levied by said board without authority of law, and that the same was illegally placed upon said assessment roll or book and delinquent list without authority. That upon the assessment roll and delinquent list of said county the said several taxes, State, county, township, and district, are blended and cannot be separated.

XXXVI.

State tax void.

And defendant, upon its information and belief, avers that the State Board of Equalization never at any time did for the said fiscal year fix or determine any rate of taxation for State purposes, and that the sum and the whole thereof claimed in the complaint for State taxes for said fiscal year is illegal and void.

Wherefore defendant prays it to be hence dismissed with costs.

P. D. WIGGINGTON,
Attorney for Defendant.

CREED HAYMOND, *Of Counsel.*

15 *Verification.*

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

E. H. Miller, Jr., being first duly sworn, on oath says: That he is an officer, to wit, the secretary of the corporation defendant herein; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on his own information or belief, and as to those he believes it to be true.

E. H. MILLER, JR.

Subscribed and sworn to before me, this 1st day of May, A. D. 1882.

[SEAL.] CHARLES J. TORBERT,
Notary Public in and for the City and County of San Francisco, State of California.

16 Endorsed: No. 374. Superior court, county of Fresno. The People, &c., plaintiff, *vs.* Central Pacific Railroad Company, defendant. Answer. Due service of the within answer admitted this 26 day of May, 1882. D. S. & S. L. Terry, by W. D. Grady, attorney for plaintiff. Filed 26th May, 1882. A. M. Clark, clerk,

by A. C. Williams, deputy clerk. P. D. Wiggington, attorney for defendant, residence, San Francisco, 330 Pine street.

17 *Petition.*

In the Superior Court, County of Fresno, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY, Defendant. } No. 374.

To the honorable the superior court in and for the county of Fresno, State of California:

Your petitioner, The Central Pacific Railroad Company, respectfully shows:

That your petitioner is the sole defendant in the above-entitled action now pending in this honorable court.

That said action was brought on the 22d day of April, 1882, the complaint therein having been duly filed on said date.

That the defendant has on this day, and before the filing of this petition, appeared in said action, and filed an answer to the complaint of plaintiff.

That no term of this court has been held since this action; and this petition is filed before the term at which the cause could be first tried.

That no trial of said action has been had, and this petition is filed before the trial thereof.

That said action is a suit of a civil nature at law, and arising under the Constitution and laws of the United States, and that the matter in dispute exceeds, exclusive of costs, the sum and value of five hundred dollars.

That said action is brought by the plaintiff to recover from the defendant on account of taxes claimed by the plaintiff to be due and payable from the defendant for State and county purposes, as will more fully appear by a reference to the plaintiff's complaint on file herein.

18 That the assessment described in the complaint and answer, and which the plaintiff in this action claims to be due and payable, is an assessment which the State Board of Equalization of the State of California pretended to make under and by virtue of the authority conferred upon the board by section 10 of article XIII of the State constitution.

That the defendant claims in this action that said provisions of the constitution of the State of California, and the authority thereby conferred upon said State Board of Equalization, violate the provisions of the Fourteenth Amendment to the Constitution of the United States, in this, that its effect is to deprive the defendant of its property without due process of law, and that under it the defendant is denied any protection from the general laws of the State of California, which—

First. Require that property shall be taxed in proportion to its value;

Second. Require such proportions to be ascertained by a general law;

Third. Require, before the liability is fixed, that the right to be heard must be given;

Fourth. Which give an appeal from the assessor to another tribunal;

Fifth. Require the assessment to be made in the county, and prevent its being made in localities distant from the *situs* of the property;

Sixth. Prescribe the mode and manner of the assessment; and

Seventh. Which allow deductions from indebtedness secured by mortgage;

Eighth. Which require property to be assessed at its actual value.

That in the assessment and apportionment described and mentioned in the answer the franchise of the defendant and the whole thereof is included in the valuation, and so blended with the other assessments and valuations that it cannot be distinguished therefrom; and defendant claims in this action that under and by virtue of the acts of Congress of July 1st, 1862, and July 2d, 1864 (which acts are referred to in said answer), the defendant was by the Government of the United States selected as an instrument and means of that Government to carry into execution the said several acts of Congress; and defendant further claims in this action that under and by virtue of said several acts of Congress the State has no power to impose a tax upon the franchise or operations of defendant, and that such tax violates the provisions of said several acts of Congress.

That prior to the 1st day of January, 1881, the defendant was indebted to divers persons, citizens of the United States, and many of them then and now citizens and *bona fide* residents of the State of California, and others of them then and now citizens and *bona fide* residents of other States of the Union, in large sums for moneys advanced to construct and equip its railroad described in the answer herein. That to secure the payment of such indebtedness the defendant long prior to the said day executed and delivered a mortgage upon its railroad and all rolling-stock and appurtenances, and upon a large number of tracts of land situated in different counties of the State of California, which said tracts of land then were, and ever since have been, the property of defendant. That said indebtedness exceeded and still exceeds three thousand dollars per mile of said road. That no part thereof has ever been paid except the accruing interest, and that the whole thereof is now, and since the execution of said mortgage has been, a valid and subsisting indebtedness against said company defendant, and has been, and still is, secured by said mortgage.

That the said pretended assessment made as aforesaid by said State Board of Equalization included the whole value of said property without any deduction therefrom. That under the constitution of the State of California, when property other than property such as is described in the complaint is assessed and valued for the purposes of taxation, it is the duty of the assessor making such valu-

ation to deduct from the value of such property all indebtedness secured by mortgage or lien upon the property. That the supreme court of the State of California, the highest tribunal in said State, has decided that defendant (and others similarly situated) is not entitled to the protection of the Fourteenth Amendment of the Constitution
19 of the United States, is not a means or instrument of the Federal Government; that its franchise is assessable and subject to taxation without the consent of the Federal Government; and that defendant and others similarly situated are not entitled to the reduction hereinbefore referred to. That said decision of the supreme court of the State of California is in full force and is binding upon the inferior courts of the State, and especially upon this court. That the facts stated in the answer herein are true, which answer defendant refers to and makes part of this petition. That defendant is the corporation mentioned in the said several acts of Congress hereinbefore referred to, and that the railroad of defendant which has been assessed by the State Board of Equalization is the road constructed, operated, and maintained by defendant under the said several acts of Congress. That the plaintiff in said action will rely upon the decision of the supreme court of the State of California, and that the construction of said several acts of Congress and of the Fourteenth Amendment to the Constitution of the United States is in this action disputed, and must necessarily be adjudged and determined herein; and that if said adjudication and determination be in favor of defendant and against that heretofore made by the supreme court of the State of California, such adjudication and determination will be conclusive in favor of defendant upon the merits of this action; that this is a suit arising under the Constitution and laws of the United States.

That your petitioner has made and filed with this petition a bond in the penal sum of five thousand dollars, with good and sufficient surety, conditioned that your petitioner shall enter in the circuit court of the United States, to be held in the district of California, in the ninth circuit, on the first day of its next session, a copy of the record in said suit, and shall pay all costs that may be awarded by the said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, and also shall appear in said circuit court and enter special bail in said suit if special bail was originally requisite therein, and shall do all such other and further appropriate acts as by the act of Congress approved March 3, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes," are requisite to be done upon removal of a suit in a circuit court of the United States from a State court; and your petitioner is ready and willing to give such other and further bonds and to do all such other acts as may be lawfully required.

Your petitioner therefore prays that this honorable court will accept this petition and said bond and proceed no further in said suit, and that said suit may be removed into the circuit court of the United States in and for the district of California, in the ninth cir-

cuit, as required by statute of the United States in such cases made and provided.

And your petitioner will ever pray, etc.

P. D. WIGGINGTON,
Attorney for Petitioner.

CREED HAYMOND,
Of Counsel.

20 Endorsed: No. 374. In the superior court, county of Fresno. The People, &c., plaintiff, *vs.* The Central Pacific Railroad Company, defendant. Petition for transfer to circuit court. Filed 26 May, 1882. A. M. Clark, clerk, by —— ——, deputy. P. D. Wiggington, attorney for petitioner. Creed Haymond, of counsel.

21 *Bond on Removal.*

In the Superior Court, County of Fresno, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs.
THE CENTRAL PACIFIC RAILWAY COMPANY, Defendant. } No. 374.

Know all men by these presents, that we, The Central Pacific Railroad Company, as principal, and Charles Crocker and W. E. Brown, as sureties, are held and firmly bound unto The People of the State of California, plaintiffs, in the sum of five thousand dollars, to be paid to the said plaintiffs; for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 28th day of April, 1882.

Whereas the above-entitled action was brought, on or about the 22d day of April, 1882, in the superior court in the county of Fresno, State of California, and the same is now pending in said superior court by The People of the State of California against said Central Pacific Railroad Company, and is removable into the circuit court of the United States in and for the district of California, in the ninth circuit, under and by that certain act of Congress of the United States, approved March 3, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes;"

And whereas said The Central Pacific Railroad Company has made, and is about to file herewith, its petition in said suit in said superior court in and for the county of Fresno, State of California, for the removal of said suit into said circuit court of the United States, to be held in the said district of California, in the ninth circuit:

Now, the condition of this obligation is such, that if said The Central Pacific Railroad Company shall enter in such circuit
22 court of the United States on the first day of its next session a copy of the record in said suit, and shall pay all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed

thereto, and also shall there appear and enter special bail in such suit, if special bail was originally requisite therein, and shall do all such other appropriate acts as by the said act of Congress are required to be done upon the removal of a suit from a State court into the circuit court of the United States, then this obligation to be void; otherwise to remain in full force and virtue.

[SEAL.] CENTRAL PACIFIC RAILROAD COMPANY,
By LELAND STANFORD, *President.*
CHAS. CROCKER. [SEAL.]
W. E. BROWN. [SEAL.]

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

Charles Crocker and W. E. Brown, the sureties in the foregoing obligation, being each sworn, each for himself says: That he is a resident of the State of California and a freeholder therein, and is worth the sum of five thousand dollars over and above all his just debts and liabilities, exclusive of property exempt by law from execution.

CHARLES CROCKER.
W. E. BROWN.

Subscribed and sworn to before me, this 28th day of April, A. D. 1882.

[L. S.] CHARLES J. TORBERT,
Notary Public.

I hereby approve of the above sureties, and accept and approve the foregoing bond.

Dated 26th May, 1882.

S. A. HOLMES,
Superior Judge.

23 Endorsed: No. 374. In the superior court, county of Fresno. The People, &c., plaintiff, *vs.* The Central Pacific Railroad Company, defendant. Bond. Filed 26th May, 1882. A. M. Clark, clerk, by —— ——, deputy. P. D. Wiggington, attorney for petitioner, San Francisco, Cal. Creed Haymond, of counsel.

24 *Clerk's Certificate.*

STATE OF CALIFORNIA, } ss:
County of Fresno, }

I, A. M. Clark, county clerk and clerk of the superior court in and for said Fresno county, do hereby certify the foregoing to be full, true, and correct copies of the original complaint, summons, answer, petition, and bond in the action therein entitled now remaining on file in my office. And I further certify that the foregoing is a copy of the whole of the record in said action now on file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this 29th day of June, 1882.

[SEAL.] A. M. CLARK, *Clerk.*

Endorsed: In the circuit court of the United States for the district of California. Record on removal of cause from superior court of Fresno county. Filed July 10, 1882. L. S. B. Sawyer, clerk.

25 *Amended Answer.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY, Defendant. } No. 2845.

Now comes the defendant, and by leave of the court first had and obtained files this its amended answer:

I.

It denies each and every allegation in said complaint had, made, or contained.

Denies that the defendant now is, or since 1864 has been, a corporation under the laws of the State of California, or otherwise than as hereinafter set out.

Denies that it is indebted to the plaintiff in any sum whatever for State or county taxes for the fiscal year 1881, or for percentage, costs of collection, or otherwise.

Denies that any assessment for said fiscal year was ever made against it, or against its property, or any property in its possession or under its control, situated in the county of Fresno, or elsewhere, in said State.

Defendant refers to and makes part of this subdivision the matter stated in subdivisions 2 to 40 of this answer.

26 And for further and separate answer defendant avers as follows:

II.

Defendant a corporation—Its place of business—Line of road—Stockholders.

The defendant is a corporation existing under the laws of the United States and of the State of California (as will hereafter more fully appear), and as such has been for many years past, and still is (except in the respect hereinafter stated), the owner of a line of railroad known as the Central Pacific Railroad, extending from the Pacific Ocean across the State of California and the State of Nevada to Ogden, in the Territory of Utah. The principal place of business of defendant now is and for many years last past has been in the city of San Francisco, State of California. Some of its stockholders and members now are and ever have been citizens of the

United States, resident in said State of California, and some of its stockholders and members now are and ever have been citizens of the United States, resident in States other than the State of California.

III.

Length of road in the several counties.

The total length of said railroad in said State of California is 602.22 miles, and the length thereof in the respective counties through which it passes is as follows: In the county of San Francisco, 4 miles; in the county of Alameda, 83.52 miles; in the county of Santa Clara, 8.50 miles; in the county of San Joaquin, 56.75 miles; in the county of Sacramento, 41 miles; in the county of Placer, 112.75 miles; in the county of Nevada, 30.25 miles; in the county of Sierra, 2.15 miles; in the county of Yuba, 15.87 miles; in the county of Sutter, 10 miles; in the county of Butte, 45 miles; in the county of Tehama, 40.24 miles; in the county of Shasta, 18.80 miles; in the county of Stanislaus, 22.63 miles; in the county of Merced, 36.75 miles; in the county of Fresno, 61.06 miles; and in the county of Tulare, 12.65 miles. The length of said road from the city of Sacramento through the counties of Sacramento, Placer, Nevada, and Sierra to the eastern boundary of said State is 186.25 miles.

IV.

Purpose of the formation of the C. P. R. R. Co. of California.

On the 28th day of June, 1861, a corporation was formed and organized under the laws of the State of California, under the corporate name of the Central Pacific Railroad Company of California. Said corporation was formed for the purpose of constructing, owning, and operating a line of railroad and telegraph, commencing at the city of Sacramento, in said State, and running thence through the counties of Sacramento, Placer, Sierra, and Nevada to the eastern boundary of said State, in the expectation that its proposed railroad would, when constructed, constitute part of a line of railroad extending from the Missouri river to the Pacific Ocean, which line was then supposed was about to be constructed under the legislative supervision and authority of the Government of the United States, and which line of railroad was afterwards so constructed.

V.

Act of Congress of July 1st, 1862—Pacific railroad act.

On or about the 1st day of July, 1862, the Government of the United States undertook to construct, or cause to be constructed, a line of railroad from the Missouri river to the Pacific Ocean, and to that end Congress passed an act entitled "An act to aid in the construction of a railroad from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes." To said act defendant here refers by

title, and makes it a part of this answer. (See United States Statutes, vol. 12, page 489.)

By said act certain persons therein named were made and erected into a corporation under the name and style of the " Union Pacific Railroad Company," and said corporation was authorized and empowered to construct, own, and operate a line of railroad and telegraph from the Missouri river to the Pacific Ocean.

27

VI.

Like privileges and immunities granted to defendant.

To facilitate the construction of said road the Government of the United States, by said act of Congress, adopted the said Central Pacific Railroad Company of California as the instrument or agent of the United States, and conferred upon it the same powers and clothed it with the same privileges and immunities which it conferred upon and clothed the said Union Pacific Railroad Company with, except that the said Central Pacific Railroad Company of California was to commence the construction of said railroad at the Pacific Ocean and build east until it met the said Union Pacific railroad building west.

VII.

Act of Congress of July 2d, 1864—Amendment.

On or about the 2d day of July, 1864, Congress passed an act entitled "An act to amend an act entitled An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government of the United States the use of the same for postal, military, and other purposes, approved July 1, 1862;" to said act defendant here refers by title, and makes the same a part of this answer. (See 13 United States Statutes at Large, page 356.)

VIII.

Intent of Congress in passing acts of 1861 and 1864.

The intent and purposes of Congress in passing said acts was to secure the completion of a railroad from the Missouri river to the Pacific Ocean, and to secure the use thereof for all time to come to the Government of the United States for the transportation of its mails, troops, munitions of war, and public stores.

IX.

C. P. R. R. Co. accepts terms offered by Congress.

Said Central Pacific Railroad Company of California filed in the Department of the Interior its acceptance of the terms and conditions of said act of Congress of July 1st, 1862, within the time therein designated.

X.

Transfer of rights to W. P. R. R. Co.

On or about the 31st day of October, 1864, said Central Pacific

Railroad Company of California sold and assigned all its rights under the aforesaid acts to a corporation then existing under the laws of the State of California, and known as the Western Pacific Railroad Company, so far as said rights related to the construction of said railroad and telegraph between the cities of San Jose and Sacramento, in said State of California; said assignment was ratified and confirmed by the United States by an act of Congress, passed on the 3d day of March, 1865, entitled "An act to amend an act entitled An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July 1st, 1862, and to amend an act amendatory thereof, approved July 2d, 1864;" to said act defendant here refers by title, and makes the same a part of this answer. (See 13 United States Statutes at Large, page 504.)

XI.

Railroad completed.

The said line of railroad, from the Pacific Ocean to Ogden, in Utah Territory, was completed and put in operation in 1869, and has been in operation from that time until the present, and still is in operation, and the whole of the railroad mentioned in the said acts of Congress have long since been completed, and is now, in accordance with the spirit and intent of said acts of Congress, operated as one continuous line from the Missouri river to the Pacific Ocean, and is so operated and maintained for the uses and purposes men-
28 tioned in said acts, and the corporations in charge thereof, including this defendant, are agents of the Federal Government, charged to carry out the purposes of said Government, as expressed in said acts of Congress.

XII.

Consolidation.

In August, 1870, acting under the said acts of Congress said Central Pacific Railroad Company of California and the said Western Pacific Railroad Company formed themselves into one corporation under the name of the Central Pacific Railroad Company. Said company is the defendant herein, and as the agent and instrument of the Federal Government has from the completion of said railroad as aforesaid, until the present time, owned (except in the respect hereinafter stated) and operated said railroad under and by virtue of said acts of Congress and for the uses and purposes therein mentioned.

XIII.

Indebtedness secured by mortgage.

The bonds loaned by the United States under said acts of Congress of July 1st, 1862, and July 2d, 1864, to said Central Pacific Railroad Company of California were about twenty-seven millions of dollars.

No part of said loan, except the accruing interest thereon, has been paid; but the same now is, and for more than five years last past has been, outstanding. To secure the payment of the same the United States now have, and ever since the issue of said bonds have had, a lien by mortgage upon the said railroad, its rolling-stock, fixtures, and franchises. By said act of Congress of July 2d, 1864, said Central Pacific Railroad Company of California was authorized to issue its bonds in an amount equal to said United States bonds and to secure the payment of the same by a mortgage upon its said road, telegraph, franchises, and properties. Under the provisions of said act said bonds to the amount of more than five thousand dollars per mile were issued before the first day of January, 1875, and the payment of the same was secured by a mortgage made by said company upon its said railroad, rolling-stock, and franchises. Said bonds are unpaid and outstanding, but are not yet due, and the same now are, and ever since their issue have been, secured by the mortgage aforesaid. Many of said bonds now are, and ever have been, owned by citizens and *bona fide* residents of the State of California, while other of said bonds now are, and ever have been, owned by citizens of the United States, *bona fide* residents of States other than California.

XIV.

Land mortgage.

To further aid in the construction of its railroad hereinbefore described, the defendant on the first day of October, A. D. 1870, made, executed, and delivered a mortgage covering all its said lands acquired under the acts of Congress aforesaid in the sum of ten million of dollars. Said mortgage was duly acknowledged and filed for record in the office of the county recorder of the several counties in which said land is situated, a copy of which is hereto annexed, marked "Exhibit A," and made a part hereof. To secure the payment of said mortgage the defendant issued bonds in the amount of ten million of dollars. A part of said bonds have been redeemed, but there still remains due and unpaid $5,749,000, which is a valid and subsisting lien upon all of said lands. Said unpaid bonds now are, and ever have been, owned and held by citizens and *bona fide* residents of the State of California; and some of said bonds now are, and ever have been, owned by citizens of the United States, *bona fide* residents of States other than the State of California.

The lands covered by said land mortgage are situate in the States of California and Nevada and the Territary of Utah. The aggregate amount of said lands in the State of California is 652,125 acres. Said lands are situated in the following counties in the quantity herein set out, as follows: In Sacramento county, 350 acres; in Placer county, 21,621 acres; in Nevada county, 30,595 acres; in Sierra county, 9,665 acres; in Yuba county, 40,664 acres; in Sutter county, 3,008 acres; in Butte county, 159,272 acres; in Tehanna county, 217,499 acres; in Shasta county, 114,606 acres; in Colusa county, 27,650 acres; in El Dorado county, 21,314 acres; in Plumas county, 5,704 acres; in Yolo county, 212.26 acres.

29 XV.

Mortgaged lands—Mode and manner of assessment—Payment of taxes.

The lands mentioned in the preceding subdivision are not, and never have been, in any way connected with the railroad business of the defendant. They are agricultural and grazing lands, held, owned, and used for farming and grazing purposes.

Said lands, and all of them, for each of the years 1880, 1881, and 1882 were assessed by the assessors of the respective counties in which they are situated at their full cash value, and no deduction from said value was made or allowed on account of said mortgage or the indebtedness secured thereby; on the contrary, the laws of the State of California under which said assessors acted in making said assessments prohibited any deduction from said values on account either of the mortgages or the indebtedness secured thereby.

In each of said years the defendant paid in full, at the time the same became payable, all the taxes levied upon said lands, amounting in the aggregate, for State, county, and municipal purposes, to over $91,000.00.

The laws of the State of California, then and ever since in force, provide that in the assessment and valuation of lands of like character and situation, and in every respect similar, both in quality and use, not owned by railroad or other quasi-public corporations, a mortgage thereon by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby, and that in the assessment and valuation of such property for the purposes of taxation, the value of said mortgages shall be deducted therefrom, and the owner of said lands or property only assessed and taxed for the value in excess of the value of the mortgage.

To assist the assessor in the performance of his duties, and to enable him to make the deductions aforesaid, the laws of the State of California make it the duty of the recorder of each county, annually, on or before the first Monday in April, to transmit to the assessor a complete abstract of all mortgages by which any debt is secured remaining unsatisfied on the records of his office at 12 o'clock meridian on the first Monday of March of said year; and it is further provided by said laws that should any such list be found to contain any instrument relating to lands situated in more than one county, it shall be the duty of the assessor to transmit to the State Board of Equalization all information relating thereto, and it shall be the duty of the State board to attach an apportionment of valuation of such instrument to be assessed in each county, and to transmit to the assessor of each county mentioned as affected in said instrument a statement of valuation of assessment to be levied against said instrument in such county. (Political Code, sect. 3678.)

In the matter of the valuation of its said lands for the purposes of taxation, the defendant is, and ever has been, deprived of all the benefits of the said laws which provide for the deduction of indebtedness secured by mortgage from the valuation of lands by reason

of the provisions of section 4 of article XIII of the constitution of the State of California, and the action of assessors in pursuance thereof; while all natural persons and all corporations not quasi public within the State of California are entitled to receive, and do receive, the full benefit of said laws, and the deductions required to be made thereunder.

XVI.

Property belonging to the U. S. exempt from taxation.

That under said constitution all property belonging to the United States is exempt from taxation.

XVII.

Assessment by State Board of Equalization.

On the 2d day of May, 1881, the State Board of Equalization of the State of California, pretending to act under and by virtue of the powers conferred upon it by section 10 of article XIII of the constitution of the State of California, did make a pretended assessment for the purposes of taxation for the fiscal year of said State then next ensuing upon the franchise, roadway, road-bed, rails, and rolling-stock of said railroad against defendant; said pretended assessment was made separately upon the franchise, roadway, road-bed, rails, and rolling-stock of said railroad, and was then and there so entered upon the minutes of said board; said assessment is the assessment upon which the several taxes mentioned in the complaint herein are based; and no other assessment than the aforesaid was ever made of said property, or any part thereof, for said fiscal year.

XVIII.

Failure of State board to transmit assessment.

The State Board of Equalization never did at any time transmit said pretended assessment, or any assessment of said property, or any part thereof, to the assessor, or to any of the authorities of said county, and never at any time caused the same to be entered upon the assessment roll of said county for said fiscal year, or for any other year, nor has said pretended assessment, or any part thereof, or any assessment against said defendant or said property, or any part thereof, ever been entered upon or made part of any assessment roll, book, or delinquent list in or for said county.

XIX.

State board never apportioned assessment.

Defendant avers, upon its information and belief, that neither said pretended assessment nor any assessment against defendant in respect to said property, or any part thereof, was ever entered upon any assessment roll or book of said county, or upon any delinquent list of said county, nor was any entry relative to the action of the said State Board of Equalization in respect to the assessment or apportionment

of said property, or any part thereof, ever entered upon said assessment roll or book, except a letter from the State Board of Equalization, addressed to the assessor of said county, which letter did not contain said assessment, or any part thereof, nor a copy of said assessment, or any part thereof, nor did it contain any apportionment thereof as provided for in section 10, article XIII, of the constitution of the State of California, hereinbefore referred to, or otherwise.

XX.

No assessment was ever made or entered on the assessment roll.

Defendant, upon information and belief, avers that neither said pretended assessment, nor any assessment against this defendant, or any other person or persons, in respect to the said property, or any part thereof, was ever entered upon any assessment roll or book of said county, nor upon any delinquent list of said county, nor was any entry relative to the action of the said State Board of Equalization in respect to the assessment or apportionment of said property of defendant, or any part thereof, ever entered upon said assessment roll or book, except the said letter of the said State Board of Equalization. Said letter was copied by the assessor of said county on or about the 1st day of June, 1881, upon the assessment. Upon said assessment roll opposite said letter is entered in figures $1,526,500.00, and opposite said figures, under the head of taxes due, is entered in figures $27,354.25. The same entries, and no others, appear upon the delinquent list of said county for said fiscal year. As defendant is informed and believes, and upon such information and belief charges the truth and fact to be, there are in respect to the said property, and in respect to defendant, no other or further entries upon any assessement roll, book, or delinquent list of said county.

XXI.

State board pretended to assess the whole of said property to defendant.

The State Board of Equalization, in making the said pretended assessment, pretended to assess to and against defendant the full cash value of said railroad, roadway, road-bed, rails, rolling-stock, and franchises, without deducting therefrom the value of the mortgage, or any part thereof, given and existing thereon as aforesaid, to secure the indebtedness of said company to the holders of said bonds, notwithstanding, as defendant avers, they had full knowledge of the existence of such mortgage.

XXII.

State board did not treat said mortgage as an interest in the property.

In making said pretended assessment, the said State Board of Equalization did not deem or treat said mortgages as an interest in said property, but did assess the whole value of said property to

the defendant in the same manner it would have done had there been no mortgages thereon.

31 XXIV.

Authority exercised by State board violates provisions of Fourteenth Amendment.

Under the constitution of the State of California the board of supervisors of the several counties of the State constitute boards of equalization for their respective counties, whose duty it is to equalize the valuation of the taxable property in the county, except the franchise, roadway, road-bed, rails, and rolling-stock of railroads operated in more than one county of the State; and to such boards the owners of all property, except as above stated, have the right and privilege to apply for the correction of their assessments, and have the right and privilege of a hearing before the said local boards of equalization. By the provisions of the constitution of California, and the laws in pursuance thereof, this right and privilege, or any right and privilege, to be heard in relation to the assessments, is denied to defendant in respect to the property in question. All of which defendant avers is contrary to the provision of the Fourteenth Amendment to the Constitution of the United States, which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws.

XXV.

Further violation of the Fourteenth Amendment.

The power conferred upon the State Board of Equalization by section ten of article XIII of the constitution violates the provision of the Fourteenth Amendment to the Coustitution of the United States, which declares that no State shall deprive any person of life, liberty, or property without due process of law; for that said section, as to such power, is self-executing and complete, and does not provide for personal or other notice to be given to the parties to be affected by the exercise of such power, and does not provide for a full or any opportunity of time, place, or tribunal for such parties to be heard in defense of their rights; and hence, under and by said provision of the constitution of the State of California the liability of owners of such property to taxation, and the amount thereof, may be fixed without notice to them or an opportunity to be heard.

XXVI.

Further discrimination.

The provisions of section four of the constitution of the State of California, providing for the assessment of the property of railroad and other quasi-public corporations, is in contravention of the provisions of said Fourteenth Amendment of the Constitution of the United States, in that it discriminates against such corporations; in this, that whereas, under said section four of said article XIII of the

constitution of the State of California, if the property of natural persons or corporations, not quasi-public, has a mortgage, lien, or incumbrance thereon, they are not liable to assessment or taxation upon such property, but only upon the value of their interest in such property over and above the value of such mortgage, lien, or incumbrance; whereas, in the case of the property of railroad and other quasi-public corporations, no such allowance or deduction is made, had, or allowed with respect to any mortgage, lien, or incumbrance there may be upon such property; and also in this, that while the tenth section of article XIII of the constitution of the State of California provides the same mode for the assessment of the franchises, roadway, road-bed, rails, and rolling-stock of all railroads operated in more than one county, whether such property be owned by railroad or other quasi-public corporations, or by private corporations, or by natural persons, yet section four of article XIII of said constitution permits or allows indebtedness secured by mortgage, trust-
32 deed, or otherwise to be deducted from the value of such property only when it is owned by natural persons or corporations not quasi-public, and denies such deduction when the property is owned by railroad or other quasi-public corporations.

XXVII.

Section 10 of article XIII of said constitution of California provides that all property, except the franchise, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county in the State shall be assessed in the county, city, city and county, town, township, or district in which it is situated in the manner prescribed by law.

The laws of said State prescribe that all property, except that above mentioned, shall be assessed in the county in which it is situated by an assessor elected by the people of such county.

Said assessors for each of said years have assessed to the owners and holders thereof in their respective counties the indebtedness of the defendant secured by the mortgage herein mentioned, but never have, nor does the law permit them so to do, made any deduction from the assessment of any of the property of this defendant on account of the assessments made as aforesaid to the holders of such indebtedness.

XXVIII.

Further discrimination.

All owners of railroad property, operated in more than one county, by virtue of said section ten of article XIII, are denied any protection from the laws of the State of California, which—

(*a.*) Require that property shall be taxed in proportion to its value.

(*b.*) Require such proportions to be ascertained by a general law.

(*c.*) Require that before liability be fixed an opportunity to be heard must be given.

(*d.*) Give an appeal from the assessor to boards of equalization.

(*e.*) Require the assessment to be made in the county, and prohibit its being made in localities distant from the *situs* of the property.

(*f.*) Which prescribe mode and manner of the assessment.

And defendant avers that at and before and ever since the adoption of the constitution of California, now in force, there were and are existing under the laws of said State corporations of various kinds, formed for the purpose of and actually operating and doing business and holding and using and operating property in more than one county in said State, and that at all of said times there were and there now are divers natural persons, residents of said State, operating property in more than one county in said State, and that at all of said times there were and now are railroads owned by corporations formed under the general laws of said State, and also by natural persons, which are only operated in one county. That by the provisions of section ten of article XIII of said State constitution persons operating railroads in more than one county in the State have been singled out from all other persons operating property in more than one county and denied the right, common to all other persons, to appeal for relief from over-valuations of their property by assessors to the local board of equalization, and denied the rights and privileges accorded by the laws to all other persons in that respect.

Corporations in said State of California now are and ever have been formed under general laws relating thereto, and railroad and all other corporations, except public corporations formed or organized for the government of a portion of the State, now are and ever have been designated by the laws of California as private corporations. Under the provisions of the laws relating to the formation of private corporations such corporations may be formed for any purpose for which individuals or natural persons may lawfully associate themselves together; and there now exist in California, and ever have
33 existed, corporations formed under said laws for fire, marine, mutual life, health, and accident insurance; building, constructing, and operating railroads, wagon roads, telegraphs, bridges, ferries, wharves, chutes, and piers, and for constructing and operating canals for the purposes of acquiring lands in large tracts, and distributing them as homesteads among the corporators, for savings and loans, for mining, for the sale and distribution of water in cities and towns, for manufacturing, mechanical, and agricultural purposes; for benevolent, charitable, and educational purposes, for cemeteries, agricultural fairs, and various other purposes.

In said State of California there now are, and for more than three years last past have been, various railroads owned, operated, and controlled either by individuals, partnerships, or by private corporations other than railroad corporations, to wit, by mining and manufacturing corporations. There now is and for more than three years last past has been a railroad in use and operation extending from the city of Marysville, in the county of Yuba, to the town of Oroville, in the county of Butte, in said State, a distance of twenty-seven miles, which said road now is, and ever has been, operated in more than one county in this State, and is of the same gauge as the

road of this defendant, and has ever been operated for like uses and purposes.

Said road, with all its equipments, now is, and for more than three years last past has been, in the ownership and under the operation and control of one N. D. Rideout, a citizen of the United States and resident of the State of California.

There now is, and for more than three years last past has been, a railroad extending from the town of Santa Cruz, on the Pacific Ocean, and in the county of Santa Cruz, eastward through said county, and into the county of Monterey to the town of Pajaro, a distance of about twenty-one miles. Said road now is, and for a long time past has been, owned, operated, and used for like purposes for which the defendant's road is owned, operated, and used, and that the same now is, and for a long time past has been, in the ownership and operated by the Pacific Improvement Company, a private corporation formed under the laws of the State of California, which said corporation is not and never has been a railroad or quasi-public corporation.

There now are, and for more than five years last past have been, divers other railroads owned and operated in said State by corporations other than railroad corporations, and by individuals and partnerships, and that all of said corporations, individuals, and partnerships are the owners of lands which are assessed by the local assessors of the various counties in which such lands are situated, and all are entitled under the laws of said State to the deductions provided for in said laws, and, as said defendant, upon information and belief, avers, have been allowed such deductions.

XXIX.

System adopted by said board violates rules of equality.

The State Board of Equalization, in making said pretended assessment of the said roadway of defendant, did willfully and designedly include in the valuation of said roadway the value of fences erected upon the land of coterminous proprietors, and did willfully and designedly value the said roadway at a greater value than the value of other property similarly situated, and greater than its actual value, upon the ground that such increased valuation should be made, because the title of defendant thereto was acquired by condemnation.

The value of such fences which were not the property of defendant, nor the property of the owners of said roadway, and the increased value affixed to the roadway by the system adopted by the board, are blended in said pretended assessment, and there is no mode or means by which such illegal valuation can be separated from those which may be legal.

XXIX (*a*).

Value of ferry-boats blended with other values.

The western terminus of the said railroad of defendant is in the

city of San Francisco, on the west side of the bay of San Francisco. The distance across said bay is five miles, and the whole thereof is part of the navigable waters of said bay. The cars of the company are transported from the end of the railroad track of said road on the eastern side of said bay to the end of the railroad track on the western side of said bay, on steam ferry-boats belonging to the defendant, built, owned, and constructed for that purpose, and are of great value. For more than four years past the defendant has been the owner of two steam ferry-boats, one of the tonnage of 1,566 tons and one of the tonnage of 1,012 tons, and during the whole of that time has used said boats for the purposes aforesaid. Said boats now are, and for more than four years last past have been, of a class which are by law required to be registered, and now are, and for more than four years last past have been, duly registered and enrolled in the city and county of San Francisco, State of California. The State Board of Equalization, in making said pretended assessment of the said roadway, road-bed, rails, and rolling-stock of defendant, did willfully and designedly include in the valuation thereof the value of said boats, and the value of said boats is blended in said pretended assessment with the value of said roadway, rails, road-bed, and rolling-stock, and there is no means by which such value can be separated from the valuation placed by said board upon said roadway, road-bed, rails, and rolling-stock, or either of them.

34 XXX.

Defendant's franchise a Federal one.

And defendant, upon its information and belief, avers that under and by virtue of the said several acts of Congress defendant became, and ever since has been, a Federal corporation, and has held its franchise and exercised all its corporate powers under the Government of the United States.

XXXI.

Corporate powers in part derived from acts of Congress.

And defendant, upon its information and belief, avers that if, by virtue of the several acts of Congress herein referred to, it did not become a Federal corporation, yet it holds under the Government of the United States all the corporate powers and franchises granted to it by the said several acts of Congress as the trustee of the said Government, and for the governmental uses and purposes specified in said acts.

XXXII.

That the franchise of defendant is not subject to State taxation.

Under and by virtue of the said several acts of Congress hereinbefore referred to the defendant was by the Government of the United States selected as the means and instrument of that Government to construct the railroad hereinbefore described, and to keep and maintain the same in repair, to the end that the said Government might,

when occasion required, use the same for the transportation of its armies and military stores, and for such other purposes as said Government might, in the execution of its powers, desire to use the same. The Government of the United States has never given to the State of California the right to lay any tax upon the franchise, existence, or operations of defendant. Such a tax would hinder and impede the lawful operations of the Government of the United States; would hinder, delay, and prevent the defendant from performing, as aforesaid, its obligations to the United States, and would nullify and prevent the enforcement of the said several acts of Congress.

XXXIII.

Whole franchise assessed.

Said pretended assessment made by the State Board of Equaliza- is upon all of the franchises of defendant, and the said board, in valuing the same, included the value of all the franchises and corporate powers held and exercised by defendant under said acts of Congress.

35

XXXIV.

Tax upon the franchise blended with tax upon other property.

That the State Board of Equalization, in making said pretended assessment, included and assessed the franchise of defendant, and in making said pretended apportionment included in the valuation affixed to the property of defendant the value thereof, but that such value is not separately stated in said apportionment, nor upon any assessment roll or delinquent list of said county, but such value is in said pretended apportionment and upon the assessment roll and delinquent list of said county blended with the values affixed to the roadway, road-bed, etc., and cannot on either be distinguished or separated from such other values, and the tax upon said franchise is in like manner blended with and cannot be separated from the tax on said roadway, road-bed, etc.

XXXIX.

Plaintiff's causes of action based upon assessment by State Board of Equalization.

On the 2d day of May, 1881, the State Board of Equalization of the State of California, pretending to act under and by virtue of the powers conferred upon it by section ten of article XIII of the constitution of the State of California, did make a pretended assessment for the purposes of taxation for the fiscal year of said State then next ensuing upon the franchise, roadway, road-bed, rails, and rolling-stock of the railroad hereinbefore described and known as the Central Pacific Railroad, against this defendant; that said pretended assessment was made separately upon the franchise, roadway, road-bed, rails, and rolling-stock of said railroad, and was then
36 and there so entered upon the minutes of said board. Said pretended assessment is the assessment upon which the

several taxes mentioned in plaintiff's complaint are claimed to be due, and that no other assessment than such pretended assessment was ever made against or upon said property or any part thereof.

Wherefore defendant prays it be hence dismissed, with costs.

H. I. THORNTON,
T. B. BISHOP,
Attorneys for Defendant.

S. W. SANDERSON,
CREED HAYMOND, AND
JOHN GARBER,
Of Counsel.

37 *Verification*

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

E. H. Miller, Jr., being first duly sworn, on oath, says: That he is an officer, to wit, the secretary of the corporation, defendant herein; that he has read the foregoing amended answer, and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on his own information or belief, and as to those he believes it to be true.

E. H. MILLER, JR.

Subscribed and sworn to before me, this 22d day of May, A. D. 1883.

[SEAL.] CHARLES J. TORBERT.
Notary Public in and for the City and County of San Francisco, State of California.

38 "EXHIBIT A."

This indenture, made this, the first day of October, A. D. 1870, between The Central Pacific Railroad Company, a railroad corporation duly incorporated and organized under and pursuant to the laws of the State of California, party of the first part, and Charles Crocker and Silas W. Sanderson, both of the city of Sacramento, and State of California, parties of the second part, witnesseth:

That whereas, by an act of the Congress of the United States of America, approved on the first day of July, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," and an act amendatory thereof, approved on the second day of July, 1864, there was granted to the Central Pacific Railroad Company of California, a railroad corporation then being duly incorporated and organized under and pursuant to the laws of the State of California, a large body of the public lands of the United States, to wit: Every alternate section of public land, designated by odd numbers, to the amount of ten alternate sections per mile on each side of the rail-

road and telegraph line of said company, running from Sacramento, in the State of California, to their junction with the railroad and telegraph line of the Union Pacific Railroad Company, at or near Ogden, in Utah Territory, a distance of seven hundred and forty miles, not sold, reserved, or otherwise disposed of by the United States, and to which no pre-emption or homestead claim had attached at the time the line of said railroad was definitely fixed, and not containing minerals other than coal and iron, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores of the United States;

And whereas, by an act of Congress of the United States of America, approved on the twenty-fifth day of July, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific railroad, in California, to Portland, in Oregon," there was granted to the California and Oregon Railroad Company, a railroad corporation then duly incorporated and organized under and pursuant to the laws of the State of California, a large body of the public lands of the United States, to wit: Every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of the railroad and telegraph line of said company, running from a point on the line of the Central Pacific railroad, at or near Roseville, in the county of Placer, and State of California, to the northern boundary of said State, a distance of two hundred and forty-six miles, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores of the United States, with a further provision to the effect that when any of said alternate sections shall appear to have been previously granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, may be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first alternate sections;

And whereas, heretofore, to wit, on the twenty-second day of June, A. D. 1870, the said Central Pacific Railroad Company of California, pursuant to a statute of the State of California in such case made and provided, was consolidated with the Western Pacific Railroad Company, a railroad corporation then duly incorporated and organized under the laws of the State of California, and owning and operating a railroad and telegraph line from the city of Sacramento to the cities of Oakland and San Jose, in the State of California, a distance of one hundred and fifty miles, into a new corporation, under the corporate name and style of the "Central Pacific Railroad Company;"

And whereas, heretofore, to wit, on the twentieth day of August, A. D. 1870, the said last-named corporation, the said California and Oregon Railroad Company, the San Francisco, Oakland and Alameda Railroad Company, a railroad corporation then existing, duly

incorporated and organized under the laws of said State, and owning and operating a railroad running from San Francisco, through the city of Oakland, to Haywards, in Alameda county, a distance of twenty-five miles, and the San Joaquin Valley Railroad Company, a railroad corporation duly incorporated and organized under the laws of said State, and then existing by virtue thereof, owning a line of railroad and telegraph running from a point on the road of the said Central Pacific Railroad Company at Lathrop, in the county of San Joaquin, to the town of Visalia, in the county of Tulare, in said State, a distance of one hundred and fifty-two miles, said railroad and telegraph being then only partially constructed, did, pursuant to a statute of said State in such case made and provided, amalgamate and consolidate themselves into a new corporation under the corporate name of the "Central Pacific Railroad Company," which last-named corporation is the said party of the first part to this indenture;

And whereas, by force and effect of said consolidation, the said party of the first part has succeeded to the title to all of said lands, and now owns and holds the same;

And whereas the said party of the first part desires to raise money for the purpose of completing the construction and equipment of said railroad and telegraph line from the town of Roseville aforesaid to the northern boundary of the State of California, and also for the purpose of completing the construction and equipment of said railroad and telegraph line from the town of Lathrop aforesaid to the town of Visalia aforesaid, and also for the payment of the
39 debts and liabilities of said party of the first part, and to that end has, by its board of directors, considered and determined to issue the bonds of said company, in the sum of one thousand dollars each, to the number of ten thousand, payable to the said parties of the second part, or to the holder thereof, twenty years from date, with interest at the rate of six per cent. per annum, payable semi-annually on the first days of April and October of each year ensuing its date, payable, both principal and interest, in United States gold coin, in the city of New York; and to secure the payment of said bonds did further consider and determine to mortgage the lands hereinbefore described, except so much thereof as is or shall be included in the rights of way of the railroads and telegraph lines of said company as defined and granted by the acts of Congress aforesaid, or is being or shall be used in the construction or operation thereof, or for the track, yards, depot grounds, buildings, or erections thereof, to the said parties of the second part in trust for the holders of said bonds;

And whereas it was further considered and determined that said bonds and each of them should bear date on the first day of October, A. D. 1870, and should have attached thereto forty interest coupons, numbered from one to forty inclusive, in the following form:

$——. Central Pacific Railroad Company. No. —.

For land bond No. —.

Interest coupons for thirty dollars, due

——— 1st, 18—.

Payable in the city of New York.

—— ———, *Secretary.*

And whereas it was further considered and determined that said bonds and each of them should be of the following tenor and form:

No. —. $1,000.

Land bond of the Central Pacific Railroad Company.

The Central Pacific Railroad Company acknowledges itself indebted to Charles Crocker and Silas W. Sanderson, both of the city of Sacramento, and State of California, or to the holder thereof, in the sum of one thousand dollars, gold coin of the United States, which sum it promises to pay to the holder hereof in the city of New York twenty years from the date hereof, with interest thereon at the rate of six per cent. per annum, payable semi-annually on the first days of April and October of each year ensuing the date hereof, both principal and interest payable in United States gold coin.

This bond is one of ten thousand, each of which is for the same sum of money and of like tenor, and all of which are secured by a mortgage to Charles Crocker and Silas W. Sanderson, as trustees for the holders thereof, on all the lands granted by the United States to the Central Pacific Railroad Company of California, by an act of Congress approved on the first day of July, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," and an act amendatory thereof approved on the second day of July, 1864; also, all the lands granted to the California and Oregon Railroad Company by an act of Congress approved on the twenty-fifth day of July, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific railroad in California to Portland, in Oregon" (which lands are now owned by the said Central Pacific Railroad Company by force and effect of a consolidation between said companies pursuant to a statute of the State of California in such case made and provided), save and except so much of said lands as are or shall be included in the right of way for the railroad and telegraph lines of the said Central Pacific Railroad Company, or is being or shall be used in the construction or operation thereof, or for track, yards, depot grounds, buildings, or other erections thereof; and, also, so much thereof as may have been sold previous to the date of said mortgage, to wit, the first day of October, 1870.

In testimony whereof, said company has caused its corporate seal

to be hereunto affixed by its president and secretary on this, the the first day of October, A. D. 1870.

Now, therefore, this indenture witnesseth: That the said party of first part, for the purpose of securing the payment of the sums of money mentioned in said bonds, and the interest thereon, and in consideration of the premises, and also for and in consideration of the sum of one dollar to the said party of the first part in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, released, enfeoffed, conveyed, and confirmed, and by these presents does grant, bargain, sell, release, enfeoff, convey, and confirm unto the said parties of the second part, as trustees, and to their successors and survivor, and their assigns, forever—

All and singular the said several sections of land so as aforesaid granted by said acts of Congress, and also the estate, right, title, interest, claim, and demand whatsoever, at law or in equity, of, in, or to the same or any part or parcel thereof, which the said party of the first part now has, holds, owns, or is entitled to, or hereafter may or shall acquire, have, hold, own, or be or become entitled to by force or virtue of the said acts of Congress, saving, excepting, and reserving all parts and parcels of said lands as have been sold heretofore, or which are or shall be included in the rights of way of the said railroads and telegraph lines of said company, as defined and granted by the acts of Congress aforesaid, or used for the construction or operation thereof, or for the track, yards, depot grounds, buildings, or erections thereof;

To have and to hold all and singular the lands hereby granted or intended to be granted, and each and every part and parcel thereof, with the appurtenances thereunto belonging, unto the said parties of the second part, and their successors and survivor, and their assigns forever, as trustees, for the uses and purposes, and upon the trusts, terms, conditions and agreements in this indenture set forth and declared.

Provided always, and these presents are upon the express condition, that if the said party of the first part shall well and truly pay, or cause to be paid, to the holders of said bonds, and every of them, the principal sums of money therein mentioned according to the tenor thereof, with the interest thereon, at the times and in the manner hereinbefore provided, according to the true intent and meaning of these presents, then and from thenceforth this indenture and the estate hereby granted shall cease and determine, and all the right, title, and interest in any and all property hereby conveyed to the parties of the second part not then disposed of under the powers hereby conferred, shall revert to and vest in the said party of the first part.

This indenture further witnesseth, that these presents and the said bonds are made, executed, and delivered upon the trusts, terms, conditions and agreements following, that is to say:

That all the lands hereinabove conveyed and mortgaged shall be under the sole and exclusive management and control of the said party of the first part, who shall have full power and authority to

make contracts for the sale of the same at such price, on such credit or terms of payment, and such other conditions as shall be agreed on by the said parties of the first and second part, and as shall seem to them best calculated to secure the payment in full of all the bonds issued as hereinbefore provided, until entry or foreclosure by the trustees as hereinafter provided. But no title to any tract of land contracted to be sold by the said party of the first part shall be given until the whole of the purchase-money of said tract shall be paid to said parties of the second part, or their successors, or survivor, in cash, or in said bonds or overdue coupons thereof. And for this purpose it is agreed that the said party of the first part and said trustees shall cause all such lands as they shall from time to time become subject to sale, to be carefully examined and surveyed, and shall affix to each tract or parcel such price as in their judgment shall be most judicious, having in view the interests of all parties; and said lands shall be and remain at all times thereafter open for sale to any person who may desire to purchase and pay therefor; the prices being nevertheless at all times subject to revision and alteration by the said parties; and the party of the first part may reserve from sale any lands necessary for depot grounds or other purposes connected with the construction or operation of the said railroad or telegraph. The purchaser of any such land shall be at liberty to pay for the same in the aforesaid bonds or overdue coupons at par; and when any tract or parcel of said lands shall have been purchased and paid for either in bonds, coupons, or cash, as hereinbefore provided, the same shall be conveyed by the said parties of the first and second part to the purchaser in fee simple, and shall by such conveyance be absolutely and forever released from any and all lien or incumbrance for or on account of said bonds, or any other debt or obligation of the said party of the first part. The said trustees shall and will cancel and discharge each and every bond and the coupons thereon, and all overdue coupons, which they may receive in payment for land or by purchase, by defacing the seal of the corporation, perforating the signatures of the president and secretary and drawing lines across each of the interest coupons on receipt thereof; and all bonds and coupons received in payment for lands as aforesaid, shall when so cancelled, be delivered to the said party of the first part.

The said trustees shall apply the proceeds of the sale made by them of lands hereby conveyed to the sole and exclusive purpose of the payment of the bonds provided for in and issued in conformity to the terms of this indenture. And for this purpose all such avails shall, from time to time as the same are realized, be used in the purchase of such bonds in the market, to be cancelled, so long as purchases thereof can be made at par; and whenever such bonds cannot be purchased at that rate said trustees shall advertise for proposals to sell such bonds to them in two newspapers published in the city of New York, and one newspaper published in each of cities of San Francisco and Sacramento, and after receiving such proposals they shall have power to purchase such bonds at the lowest terms so offered. The said party of the first part doth hereby

covenant and agree to pay to the holders of said bonds respectively the said principal sums of money therein mentioned, and the interest thereof as aforesaid. If any default shall be made in the payment of either of principal or interest on any of said bonds for six months after demand at the place of payment, when the same shall become due, then the said trustees may, on being requested by the holders of at least one hundred thousand dollars of such bonds, enter into and take possession of any of the lands above conveyed and foreclose this mortgage, and may sell at public auction so much of said lands as may be necessary to discharge all arrears of such interest, and apply the proceeds, after deducting the costs, charges, and expenses of such entry, foreclosure and sale, to the payment of such arrears of interest. If any such default shall continue for one year from the time of such demand and refusal, the principal sum of all said bonds then outstanding shall become due and payable, and the said trustees may enter into and take possession of all the lands above by by these presents mortgaged or conveyed, foreclose this mortgage, and sell at public auction all said lands, or so much thereof as may be necessary, first giving at least six months' previous notice of the time and place of sale in at least one newspaper published in the city of New York, and in one published in each of the cities of San Francisco, Sacramento, Virginia, and Salt Lake; and they shall apply the proceeds thereof, after deducting the costs, charges, and expenses of such last-mentioned entry, foreclosure, and sale, to the payment of all said bonds then outstanding, and the interest accrued thereon, rendering the overplus, if any there shall be, unto the said party of the first part. In case of any sale upon any such foreclosure, or at any such public auction, the said trustees shall make, execute, and deliver a conveyance of the said lands so sold, which shall convey to the purchasers all the rights and privileges of the said party of the first part in and to the property so sold, to the same extent as the same shall have been previously enjoyed and and held by the said party of the first part. If, after such entry shall be made, or any such foreclosure proceeding shall be
41 commenced, for the satisfying of interest only, as above provided, and before the lands are sold thereon, the said party of the first part shall pay and discharge such interest and deliver the coupons therefor to the said trustees, and pay all the costs, charges, and expenses incurred in such entry and foreclosure and the proceedings thereon, then and in every such case the said trustees shall discontinue their proceedings thereon and restore to the said party of the first part all such lands, to be held subject to the above conveyance and mortgage, and subject to all the provisions, terms, and conditions of these presents in like manner as if such entry had not been made nor such foreclosure proceedings commenced.

In case a vacancy shall happen in the number of trustees hereinbefore mentioned as parties of the second part in this indenture, or if one of them shall be temporarily absent, the remaining trustee shall, while said vacancy or absence exists, have all the rights, exercise all the powers, and discharge all the duties devolving on the

said trustees by this instrument. But, as soon as it conveniently may be done, such vacancy shall be filled by the nomination by the remaining trustee of some proper person to fill such vacancy, which nomination shall be submitted to the board of directors of said company, and, if approved by them, the person so nominated and approved immediately shall become a trustee under this instrument. If said nomination is not approved, another person shall be nominated by said remaining trustee, and in like manner submitted for approval; and so on until three nominations shall have been made. But if three successive nominations shall be made, and none of them shall be approved by said board, said vacancy shall be filled by a committee of three persons, selected, one by said remaining trustee, one by said board of directors, and a third by the two thus selected, and the person appointed trustee by a majority of the committee shall be and remain a trustee under this instrument. And the person regularly appointed a trustee to fill a vacancy in either of the forms above specified shall, from and after his said appointment and his acceptance of the appointment, become vested with the same estate, powers, rights, and interests, and charged with the same duties and responsibilities, as if he had been one of the original trustees, parties of the second part, named in and executing this instrument; and the prior remaining trustee may and shall execute such conveyances and instruments as may be proper or necessary to vest the same in such new trustee jointly with him, or to furnish evidence of such vesting. If at any time either of the said trustees shall resign his place as trustee, by a proper deed or writing to that effect, and such resignation shall be accepted by the said party of the first part, then and in every such case the place of such resigning trustee thereupon shall become and be vacant. Whenever all the bonds which shall have been made and issued by the said party of the first part under and in conformity to the provisions of this indenture, with the interest thereon, together with all the expenses incurred by the said trustees in the execution of the trust herein and hereby created, shall have been fully paid, the said trustees shall reconvey to the said party of the first part all and singular the said lands then in the hands of the said trustees, and not before that time sold or disposed of in the execution of the trust hereby created. In case the said trustees shall at any time have any trust moneys on hand, derived from the sale of the lands hereby conveyed, which will not be required to meet any immediate liabilities of the company to which said moneys are by these presents devoted, the said moneys shall be deposited on interest with some bank or trust company in the city of San Francisco or Sacramento, subject to be drawn by checks signed by the trustees or such one of them as they may designate. All the books of the said company and of the trustees relating to the lands hereby conveyed shall be mutually open to the inspection of said company and said trustees. It shall be the duty of said trustees to certify and deliver to the said party of the first part the said bonds, as the same from time to time shall be demanded, issued, or used by the said party of the first part.

And it is hereby mutually agreed by and between the parties hereto that the said parties of the second part, and their survivor and successors, and their heirs, executors, and administrators, shall not be answerable for the acts, omissions, or defaults of each other, nor for anything short of their own gross negligence or willful misfeasance.

It is hereby declared by the parties to this indenture that all the provisions of said acts of Congress, so far as they are applicable, are hereby made and shall be deemed and taken to be a part of this instrument; and the said provisions, in all that concerns the sale and disposal of the said lands hereby conveyed to the parties of the second part, are to be observed and strictly and faithfully carried out and fulfilled. And the said party of the first part covenants and agrees to and with the said parties of the second part that the said party of the first part shall and will at any and all times hereafter, and from time to time, execute, acknowledge, and deliver, under its corporate seal, to the said parties of the second part, and their survivor or successors, all such other or further assurances, deeds, mortgages, obligations, transfers, indentures, and instruments in writing, and shall and will do and perform all such other or further acts or things as shall or may be necessary or proper, or as their counsel, learned in the law, shall deem necessary, proper, or expedient for the better or more effectually securing upon the above conveyed and mortgaged premises the payment of the said bonds so to be issued, and the interest due and to grow due thereon, in manner aforesaid, or for carrying into effect the true intent, design, objects, and purposes of these presents.

In witness whereof, the said party of the first part has caused these presents to be signed with its corporate name and sealed with its corporate seal, by its president and secretary, the day and year first above written.

[SEAL.]

LELAND STANFORD,
President C. P. R. R. Co.
E. H. MILLER, JR.,
Secretary C. P. R. R. Co.

We accept the trust declared in the foregoing instrument.

CHARLES CROCKER. [SEAL.]
SILAS W. SANDERSON. [SEAL.]

Endorsed: Filed July 9th, 1883. L. S. B. Sawyer, clerk.

42 *Stipulation Waiving Jury.*

At a stated term, to wit, the July term, A. D. 1883, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, held at the court-room, in the city and county of San Francisco, on Tuesday, the 31st day of July, in the year of our Lord one thousand eight hundred and eighty-three.

Present: The Honorable S. J. Field, circuit justice; the Honorable Lorenzo Sawyer, circuit judge.

THE PEOPLE OF THE STATE OF CALIFORNIA,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY. } No. 2845.

It is hereby stipulated by and between the above-named
43 parties that the above-entitled cause be tried by and before the court without a jury, a jury being hereby expressly waived.

Dated San Francisco, July 31st, 1883.

D. S. & S. L. TERRY,
Att'ys for Plaintiff.
E. C. MARSHALL,
Att'y General.
P. D. WIGGINTON,
H. S. BROWN,
Attorneys for Defendant.

Endorsed: Filed July 31, 1883. L. S. B. Sawyer, clerk.

44 *Findings.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
THE CENTRAL PACIFIC RAILWAY COMPANY. } No. 2845.

The above-entitled cause having, on the 31st day of July, 1883, been brought on to a hearing before the court, without a jury, the said parties, by stipulation in writing, having waived a jury, and the evidence introduced by the respective parties having been fully considered, the court finds the facts in issue in said action as follows:

Defendant's organization.—Existence and character

I.

In May, 1852, the Legislature of the State of California passed an act entitled "An act to grant the right of way to the United States for railroad purposes," which act is found in the Stat. of Cal., 1852, p. 150, and is herein referred to and made a part of this finding.

II.

On the 1st day of 1862, Congress passed an act entitled "An act to aid in the construction of a railroad from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes;" which act is found in the United States Statutes at Large, vol. 12, page 489, *et seq.*, and which act is herein referred to and made part of this finding.

III.

Said Central Pacific Railroad Company of California, within due time, filed in the Department of the Interior its acceptance of the terms and conditions of said act of Congress of July 1, 1862.

45 IV.

On the 3d day of March, 1863, Congress passed an act entitled "An act to establish the gauge of the Pacific railroad and its branches," which act is found in the United States Statutes at Large, vol. 12, page 807, and which act is herein referred to and made part of this finding.

V.

In the month of March, 1863, the Legislature of the State of California passed an act entitled "An act to authorize the board of supervisors of the county of San Joaquin to take and subscribe two hundred and fifty thousand dollars to the capital stock of 'The Western Pacific R. R. Co.,' and to provide for the payment of the same and other matters relating thereto." Said act is found in Stats. of Cal., 1863, p. 80 *et seq.*, and is herein referred to and made part of this finding. In the month of April of same year the Legislature passed an act entitled "An act to authorize the board of supervisors of the city and county of San Francisco to take and subscribe one million dollars to the capital stock of 'The Western Pacific R. R. Co.' and 'The Central Pacific Railroad Co.,' and to provide for the payment of the same, and other matters relating thereto," which act is found in Stats. of Cal. for 1863, p. 380, and is herein referred to and made part of this finding. Said Legislature, in the same month and year, passed an act entitled "An act to authorize the county of Placer to subscribe to the capital stock of 'The C. P. R. R. Co. of California,' and to provide for the payment of the same, and other matters relating thereto," which act is found in Stats. of Cal., 1863, p.145, and is herein referred to and made part of this finding. Numerous acts of a similar nature are found scattered through the statutes of California.

VI.

On the 4th day of April, 1864, the Legislature of the State of California passed an act entitled "An act to aid in carrying out the provisions of the Pacific railroad and telegraph act of Congress and other matters relating thereto," which act is found in the statutes of California for 1863–'4, at page 471 *et seq.*, and which act is herein referred to and made part of this finding.

VII.

On the 2d day of July, 1864, Congress passed an act entitled "An act to amend an act entitled an act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government of the United States the use

of the same for postal, military, and other purposes, approved
46 July 1, 1862," which act is found in the United States Statutes at Large, vol. 13, page 536 *et seq.*, and which act is herein referred to and made part of this finding.

VIII.

On the 31st day of October, 1864, said Central Pacific Railroad Company of California sold and assigned all its rights under the aforesaid acts to a corporation then existing under the laws of the State of California, and known as the Western Pacific Railroad Company, so far as said rights related to the construction of said railroad and telegraph between the cities of San Jose and Sacramento, in said State of California.

IX.

On the 3d day of March, 1865, Congress ratified and confirmed said assignment by an act entitled "An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes,' approved July 1, 1862, and to amend an act amendatory thereof, approved July 2, 1864;" which act is found in the United States Statutes at Large, vol. 13, page 504 *et seq.*, and which act is herein referred to and made part of this finding.

X.

In August, 1870, acting under the said acts of Congress, said Central Pacific Railroad Company of California and the said Western Pacific Railroad Company formed themselves into one corporation under the name of the Central Pacific Railroad Company. Said company is the defendant in this action, and is a corporation under the laws of the State of California, except in so far as its organization, existence, and character may be affected by the Federal or State statutes in these findings referred to.

XI.

Defendant has complied with the provisions of said acts, and there now is in operation a continuous line of railroad from the Missouri river to the Pacific Ocean, the defendant owning and operating the portion thereof from Ogden, in the Territory of Utah, to San Francisco, in the State of California.

XII.

On the 7th day of May, 1878, Congress passed an act entitled "An act to alter and amend the act entitled an act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the
47 same for postal, military, and other purposes,' approved July 1, 1864, in amendment of said first-named act," which act is

found in vol. 20, United States Statutes at Large, page 56 *et seq.*, and which act is herein referred to and made part of this finding.

XIII.

The total length of said railroad in said State of California is 602.22 miles, and the length thereof in the respective counties through which it passes is as follows: In the county of San Francisco, 4 miles; in the county of Alameda, 83.52 miles; in the county of Santa Clara, 8.5 miles; in the county of San Joaquin, 56.75 miles; in the county of Sacramento, 41 miles; in the county of Placer, 112.75 miles; in the county of Nevada, 30.25 miles; in the county of Sierra, 2.15 miles; in the county of Yuba, 15.87 miles; in the county of Sutter, 10 miles; in the county of Butte, 45 miles; in the county of Tehama, 40.24 miles: in the county of Shasta, 18.80 miles; in the county of Stanislaus, 22.63 miles; in the county of Merced, 36.75 miles; in the county of Fresno, 61.06 miles, and in the county of Tulare, 12 miles. The length of said road from the city of Sacramento, through the counties of Sacramento, Placer, Nevada, and Sierra to the eastern boundary of said State, is 186.25 miles.

XIV.

The roadway of defendants varies in width from thirty to four hundred feet.

The assessment—Mode and manner.

XV.

Within due time, the secretary of the defendant filed with the State Board of Equalization the sworn statement required by section 3664 of the Political Code of California.

XVI.

No record of assessment as made by said State Board of Equalization was introduced in evidence on the trial, and there was no other evidence as to the assessment in question than as shown by the documents set out in these findings, or as shown by the facts stated in the findings.

XVII.

The following is a copy of the assessment roll for the county of Fresno for the year 1881, so far as it relates to the tax in question in this case, and includes said tax, and is the only evidence of the assessment of said tax, no other record of the assessment, as made by the State Board of Equalization, having been introduced, to wit:

Taxpayer's Name.	Description of Property. Real estate other than city and town lots. Subdivision of sections or metes and bounds. City and town lots. Improvements. Personal property.	Value of the franchise, roadway, road bed, rails, and rolling-stock of railroads as apportioned to the county by the State Board of Equalization.	Total value after equalization by the State Board of Equalization.	Total tax.	Remarks.
	Office of the State Board of Equalization, Sacramento, *May* 14, 1881.				
Central Pacific R. R. Company.	To W. H. McKenzie, *Assessor of Fresno County, California.*	$	$	$ cts.	
	Sir: The State Board of Equalization, on the 2nd day of May, 1881, assessed for the year 1881, the Central Pacific Railroad Company for its franchise, roadway, road-bed, rails, and rolling-stock, in the State of California, in the aggregate sum of $15,055,500.	1,526,500	1,526,500	25,950 50	
	The entire length of main track of railway of said company in the said State is 602.22 miles.				
	The length of main track of said railway in Fresno county is 61.06 miles.				
	The distribution of the whole of the main track of the railway of the said Central Pacific Railroad Company, and the right of way for the same, in Fresno county, is as follows:				
	Beginning at a point on the dividing line between Merced and Fresno counties, northwest of Mintumin, T. 9 S., R. 15 E., Mt. D. B and M., and thence running southeasterly across the county of Fresno, through the town of Fresno, to the dividing line between Fresno and Tulare counties, at a point near Kingsburg, in T. 16 S., R. 22 E, Mt. D. B. and M. The assessed value per mile of said railway, as fixed by a *pro rata* distribution per mile of the assessed value of the whole franchise, roadway, road-bed, rails, and rolling-stock of such railway of the said company within this State is $25,000. The apportionment of the assessment of the said franchise, roadway, road-bed, rails, and rolling-stock by the board for and to Fresno county is $1,526,500.				
	WARREN DUTTON, *Chairman*, JAMES L. KING, M. M. DREW, D. M. KENFIELD, T. D. HEISKELL, *State Board of Equalization.* E. W. MASLIN, *Clerk.*				

(Duly certified by county auditor.)

49 XVIII.

The board of supervisors of Fresno county duly apportioned said tax among the legal subdivisions of said county.

XIX.

The delinquent list for the said year, so far as it relates to the tax in question, was duly made up in form corresponding with the original assessment roll.

XX.

In pursuance of section 3738 of the Political Code of California, the board of supervisors of Fresno county duly passed an order, entered in the minutes, dispensing with the duplicate assessment roll for that county for that year.

XXI.

The controller of the State transmitted a letter to the tax collector of Fresno county, in pursuance of the provisions of section 3899 of the Political Code, directing the tax collector of Fresno county to offer the property in question for sale but once, and if there were no *bona fide* purchasers to withdraw it from sale.

XXII.

On or about the eleventh day of April, A. D. 1882, the tax collector of the county of Fresno, in obedience to the provisions of section 3899 of the Political Code of California, transmitted to the controller of the State of California, with his indorsement thereon of the action had in the premises, a copy of the delinquent list relative to the tax in question. Said indorsement shows that the said tax collector had offered said property for sale and withdrawn it because there was no purchaser for the same.

XXIII.

The controller of State, in pursuance of the provisions of the same section, transmitted to the tax collector of said county a letter directing him to bring suit.

XXIV.

The mortgages.

The bonds loaned by the United States under said acts of Congress of July 1, 1862, and July 2, 1864, to said Central Pacific Railroad Company of California, were about twenty-seven millions of dollars. No part of said loan, except the accruing interest thereon, has been paid; but the same now is, and for more than five
50 years last past has been, outstanding. To secure the payment of the same the United States now have, and ever since the issue of said bonds have had, a lien by virtue of the said statutes of the United States upon the said railroad, its rolling-stock, fixtures, and

franchises. By said act of Congress of July 2, 1864, said Central Pacific Railroad Company of California was authorized to issue its bonds in an amount equal to said United States bonds, and to secure the payment of the same by a mortgage upon its said road, telegraph, franchises, and properties. Under the provisions of said act, said bonds to the amount of more than five thousand dollars per mile, were issued before the first day of January, 1875, and the payment of the same was secured by a mortgage made by said company upon its said railroad, rolling-stock, and franchises, which is in the words and figures following, to wit:

This indenture, made and entered into this twenty-fifth day of July, 1865, by and between the Central Pacific Railroad Company, a railroad corporation duly organized under and in pursuance of the laws of the State of California, parties of the first part, and D. O. Mills and William E. Barron, of the city of San Francisco, in said State of California, parties of the second part, witnesseth:

Whereas, by an act of the Congress of the United States of America, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," approved July 1st, 1862, the Secretary of the Treasury of the United States was authorized to issue to the said Central Pacific Railroad Company of California, in accordance with the terms and provisions of the said act, the bonds of the United States for one thousand dollars each, payable in thirty years after date, bearing interest at the rate of six per cent. per annum, to the amount of sixteen of said bonds per mile, for that portion of their line of railroad lying between the foot of K street, in the city of Sacramento, in the State of California, and the western base of the Sierra Nevada Mountains, as fixed by the President of the United States, in accordance with the provisions of said act, the same being a distance of seven and eighteen-hundredths miles, and for that portion of their railroad line lying one hundred and fifty miles eastwardly of said western base of the Sierra Nevada Mountains, forty-eight of said bonds per mile, for which bonds the United States retained a lien on the said railroad of the said company.

And whereas by the provisions of an act of said Congress amendatory of said act, approved July 2d, 1864, the said company was authorized to issue its "first mortgage bonds" on their railroad line, to an amount not exceeding the amount of the said bonds of the United States, and the said lien of the said United States
51 bonds was therein and thereby made subordinate to that of the said bonds of the said company thereby authorized to be issued; and whereas, also, by the provisions of an act of said Congress, amendatory of the before-mentioned acts, approved March 3d, 1865, the said company were further authorized to issue their said six per cent. thirty year "first mortgage bonds," payable in any lawful money of the United States, to the extent of one hundred miles in advance of a continuous completed line of construction; and whereas, the said company is about to issue, and intends, from time to time, as the same may be required for the construction and equip-

ment of their railroad, to issue its said "first mortgage bonds" in form and substance, and to the amount and extent authorized and provided for, in and by the said several acts of Congress, which said bonds have, by the provisions of the said acts of Congress, priority of lien on the railroad line of the said company, over the said United States Government bonds; and whereas, the execution and issue of the said "first mortgage bonds" have also been duly authorized and directed by an order and resolution of the board of directors of the said company; and whereas, the said board of directors ordered and directed that the said "first mortgage bonds" should be executed and issued upon that portion of the railroad line of said company lying between the city of Sacramento and the eastern boundary line of the State of California, to an amount equal to and not exceeding the amount of the said United States Government bonds issued and to be issued thereon, the length of said railroad line from its terminus in the city of Sacramento to the western base of the Sierra Nevada mountains, as fixed by the President of the United States, in pursuance of said acts of Congress, being seven and eighteen-hundredths miles, and the length of said railroad line from said western base to the eastern boundary line of the State of California being estimated at one hundred and twenty-five miles; and said board of directors further ordered and directed that the said "first mortgage bonds" should be executed and issued in four several series, to be designated by the first four letters of the alphabet; the first of said series to be designated as "Series A," and that said "Series A" should bear date July 1, 1865, and include three thousand of said bonds for $1,000 each; "Series B" to include one thousand bonds for $1,000 each; "Series C" to include one thousand bonds for $1,000 each; "Series D" to be of bonds for $1,000 each, and to include the remainder of said bonds authorized to be issued on said portion of said railroad line, under said acts of Congress; the said "Series B," "C," and "D" to bear such date as may hereafter be fixed by the Board of Directors of said company, which said bonds are and will be in the following form, to wit:

"The Central Pacific Railroad Company of California acknowledge themselves to owe to Eugene Kelly, of the city of New York,
52 or to the holder hereof, the sum of one thousand dollars, which sum they promise to pay to the holder hereof, in the city of New York, thirty years from the date hereof, with interest thereon at the rate of six per cent. per annum from the first day of July, 1865, payable semi-annually, on the first day of January, 1866, and on the first days of July and January of each year thereafter, in the city of New York, upon the surrender of the annexed coupons, both principal and interest payable in United States gold coin at par, dollar for dollar."

This bond being one of the "Series A" of "first mortgage bonds" which the said company is authorized to issue upon that portion of their railroad line between the city of Sacramento and the eastern boundary line of the State of California, in accordance with the provisions of an act of the Congress of the United States, approved July 2, 1864, entitled "An act to amend an act entitled 'An act to aid in

the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes,'" approved July first, eighteen hundred and sixty-two, and the acts amendatory of the said acts, approved March 3d, 1865, by the provisions of which acts the said company is authorized to issue its first mortgage six per cent. thirty-year bonds on its line of railroad, payable in any lawful money of the United States, to an amount not exceeding the amount of the bonds of the United States provided to be issued to said company, and by which also the lien of the United States bonds on the railroad property and equipments of the said company is made subordinate to that of the said "first mortgage bonds." The holder of any of the said bonds to have no preference over any other of said bondholders by reason of priority in the time of issuing the same or otherwise. The said "Series A" consisting of three thousand bonds for one thousand dollars each.

Series A No. ——.

The payment of the principal and interest of this and the others of said "first mortgage bonds" is secured by a first mortgage executed by the said company upon the whole of their railroad from the city of Sacramento to the eastern boundary line of the State of California, and all the rolling-stock, fixtures, and franchises thereof, to D. O. Mills and William E. Barron, of San Francisco, as trustees for the holders of such "first mortgage bonds" and coupons. And it is hereby stipulated and conditioned that the city and county of San Francisco, and the counties of Sacramento and Placer, in the State of California, shall not be liable for any of the debts or liabilities of said company to an amount beyond or exceeding the amount of the capital stock of said company subscribed or which may hereafter be subscribed by them or either of them upon the books of said company.

53 In testimony whereof, the said company have caused their corporate seal to be hereunto affixed, and the same to be signed by their president and secretary, this first day of July, 1865.

[L. S.] LELAND STANFORD, *President.*
E. H. MILLER, JR., *Secretary.*

[Canceled U. S. internal revenue stamp for $1.]

To each of which said bonds there is attached sixty interest coupons, numbered, respectively, from one to sixty, inclusive, of one of which the following is a copy, to wit:

$30. CENTRAL PACIFIC RAILROAD COMPANY OF CALIFORNIA. 60.

For bond No. ——.

Interest coupon for thirty dollars.

Due July 1, 1896.

Payable in the city of New York.

E. H. MILLER, JR., *Secretary.*

And to each of said bonds there is, and will be, affixed, when is-

sued, a canceled U. S. internal revenue stamp or stamps of the value of one dollar.

And whereas the board of directors of the said company, under and in pursuance of the said acts of Congress and the laws of the State of California, further ordered and directed that, to secure the payment of the said "first mortgage bonds" issued or to be issued upon that portion of the railroad line of said company hereinbefore described, a mortgage of the said company be executed, signed by the president and secretary and sealed with the corporate seal of the company, to the said D. O. Mills and William E. Barron, as trustees for the holders of said bonds upon the railroad of said company now constructed, or to be hereafter constructed, from Sacramento to the eastern boundary line of the State of California, and the fixtures, rolling-stock, and franchises of the company, as by the said orders of the said board of directors will more fully appear:

Now, therefore, this indenture witnesseth, that the said Central Pacific Railroad Company of California, for the better securing the payment of the principal and interest of the said "first mortgage bonds" issued or to be issued in the several series aforesaid, on the days and at the places therein and herein prescribed for the payment thereof, and also in consideration of the sum of one dollar to it in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, convey, and confirm, unto the said parties of
54 the second part, and to their successors duly appointed for the execution of the trusts herein set forth, and to their assigns forever, the following property, part of which is now, and part of which is hereafter to be, constructed, purchased, acquired, held, possessed, and owned by the said company, to wit, the railroad of the said company, commencing at the city of Sacramento and running thence in an easterly direction through the counties of Sacramento, Placer, and Nevada to the eastern boundary line of the State of California, including all of said line of railroad now completed and in process of construction, as well as that portion of the same which may hereafter, in whole or in part, be constructed or completed, including therein the roadway and track, together with all the superstructures, depots, depot grounds, station-houses, watering-places, workshops, machine shops, machinery, side-tracks, turn-outs, turntables, weighing scales, fixtures, locomotives, tenders, rolling-stock, fuel, equipments, and all other property which is necessarily or ordinarily used in operating the said railroad, and all rights and privileges of way or transit which are now or may be hereafter constructed, purchased, acquired, held, possessed, or owned by the said company and pertaining to said line of railroad, and all corporate rights, privileges, and franchises of said company, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, income, issues, and profits thereof, with all the right, title, interest, property, possession, claim, and demand in law and in equity of the said parties

of the first part, of, in, and to the same and every part and parcel thereof.

To have and to hold the above granted and described premises, property, and franchises, with the appurtenances, unto the said parties of the second part and to the survivors of them, and to their successors duly appointed, upon trust, and for the use and benefit of the person or persons, body or bodies politic or corporate, who shall become, or be from time to time, holders of the said several series of "first mortgage bonds," or any of them, issued or to be issued by the said parties of the first part or their successors as aforesaid, without reference to the holder of any of the said bonds over the others, or any other, by reason of priority in the date or the time of issuing the same or otherwise: Provided always, and these presents are upon the express condition, that if the said party of the first part or their successors shall well and truly pay, or cause or procure to be paid, unto the holders from time to time of said bonds, and each and every of them, the said sums of money secured to be paid by the said bonds, and the interest coupons attached thereto, at the places and times and in the manner set forth in the said bonds according to the true intent and meaning thereof, then these presents and
55 all property, estate, rights, franchises, and privileges herein and hereby granted and conveyed shall cease, determine, and be void.

But if default shall be made in the payment of the said sums of money specified in said bonds, or in the payment of said interest coupons, or either of them, or any part thereof, and if the same shall remain unpaid for the period of six months from and after the time when the same should have been paid, according to the terms of said bonds, then the said parties of the second part, or either of them, upon the refusal of the other, or their successors in said trust, by themselves or their agents or servants in that behalf, may upon request of the holder or holders of not less than fifty of said bonds on which the interest or principal shall so be and have remained in default as aforesaid, enter into and upon, and take the possession of all, or in their or his discretion, any part of the said premises and property hereinbefore described, and work and operate the said railroad and receive the income, receipts, and profits thereof, and out of the same pay, first, the expenses of running and operating the same, including therein such reasonable compensation as they or he may allow to the several persons employed or engaged in running and superintendence of the same, and a reasonable compensation to the parties of the second part, or their successors, or such of them as shall act in the premises, for their or his care, diligence, and responsibility in the premises; and second, the expenses of keeping the said road, and the appurtenances and the locomotives, and the rolling-stock thereof in good and sufficient repair, to prevent deterioration in the value thereof, and all other reasonable and proper charges and expenses of the care and management thereof; and, third, pay, as far as the same will suffice, all interest and the principal, if any, which may be due on said bonds, and in case of any deficiency, to apply said receipts, after the payment of all said

charges and expenses, to the payment thereof ratably, without preference of any kind, or the said parties of the second part may, in such case, sell and dispose of, according to law, all the rights, property, privileges, franchises, real and personal, with the appurtenances herein and hereby granted, or so much thereof as may be necessary, and out of the money arising from such sale pay, first, the costs, charges, and expenses of the foreclosure and sale, including therein reasonable counsel fees for conducting said proceedings, to be allowed and fixed by the court, but not exceeding thirty thousand dollars; and, second, any expenses, costs, or charges of the execution of this trust previously incurred and remaining unpaid; third, a reasonable compensation to the trustees, or one of them who may act, for their or his care, trouble, and services in completing the execution of
56 this trust and the distribution of the proceeds of sale, to be fixed by the court, but not exceeding the sum of fifty thousand dollars; and, fourth, to distribute the residue of said proceeds among the holders of said bonds in proportion to their several interests, until all have been paid in full, principal, and accrued interest.

And the said parties of the first part hereby agree and covenant to and with the said parties of the second part, and their successors in said trust, that they will pay all ordinary and extraordinary taxes, assessments, and other public burdens and charges which shall or may be imposed upon the property herein described and hereby mortgaged, and every part thereof, and the said parties of the second part, the survivor of them, or their successors in said trust, or any one or more of the holders of said bonds, may, in case of a default of the said parties of the first part in this behalf, pay and discharge the same and any other lien or incumbrance upon said property which may in any way, either in law or equity, be or become in effect a charge or lien thereon, prior to these presents, or to which this mortgage may be subject or subordinate, and for all payments thus made the parties so making the same shall be allowed interest thereon at the rate of seven per cent. per annum, and such payments, with the interest thereon, shall be, and are hereby, secured to them by these presents, and declared to be payable and collectible in the same sort of currency or money, wherein they shall have been paid, and the same shall be payable by said parties of the first part to said parties of the second part, in trust for the party or parties paying the same, upon demand, and may be paid out of the proceeds of the sale of said property and franchises as hereinbefore provided.

And the said parties of the first part hereby covenant and agree to and with the said parties of the second part, and their successors in said trust, that they will at any and all times hereafter, upon the request of the said parties of the second part, execute and acknowledge and deliver to the said parties of the second part, and their successors in said trust, all and every such further necessary and reasonable conveyances and assurances of the said premises, or any part thereof, as may, by the parties of the second part, or the survivor of them, or his or their successor in the trust hereby created, be reasonably

advised or required for more fully carrying into effect the objects of this conveyance, and the said parties of the second part, and their successors in said trust, shall be entitled to receive a just and proper compensation for all services rendered by them in the discharge of said trust, and the same shall be deemed to be secured hereby.

And it is hereby stipulated and agreed that the said parties of the second part, and their successors in said trust, shall not be responsible for the acts or omissions of any agent or agents employed by him and them in any manner in and about the execution of the trust hereby created, when such agent or agents are selected
57 with reasonable discretion, or with the approbation, or with the knowledge and without the express disapproval of said parties of the first part, nor shall either of the said parties of the second part be responsible for any act or omission of the other in the execution of said trust.

And it is hereby mutually covenanted, agreed, and declared, that in case either of the parties hereto of the second part shall die or become or be incapacitated from discharging the duties of this trust, or shall resign the same by an instrument under his hand and seal, duly acknowledged or proved as a conveyance so as to entitle the same to be recorded and delivered to the parties of the first part, or the remaining trustee, then the remaining or surviving trustee shall select, and by a like instrument duly acknowledged and proved, nominate to the said parties of the first part, and the said parties of the first part shall and will by resolution appoint the person so nominated as such new trustee in place of the trustee so dying, becoming incompetent or resigning, and so in case of the death, incapacity, or resignation of any new or substituted trustee, his place shall be filled in like manner, and all the estate, property, rights, and interests of the said trustee so dying, becoming incompetent or resigning, shall, on the execution, acknowledgment, and delivery of such nomination, immediately and by force of this instrument vest in said new trustee as fully and completely, in all respects, as if he had been herein named as one of the said parties of the second part.

And it is hereby further stipulated and agreed that the city and county of San Francisco, and the counties of Sacramento and Placer, in the State of California, shall not be liable for any of the debts or liabilities of said company to an amount beyond or exceeding the amount of the capital stock of said company subscribed, or which may hereafter be subscribed by them, or either of them, upon the books of said company.

And the said parties of the second part hereby accept the trust created and declared by this instrument, and agree to discharge the same pursuant to the provisions in that behalf herein contained.

In witness whereof, the said Central Pacific Railroad Company of California have caused these presents to be signed by their president and secretary, and sealed with their corporate seal, and the said

parties of the second part have hereunto set their hands and seals, the day and year first above written.

[L. S.] LELAND STANFORD,
President C. P. R. R. Co.

[L. S.] E. H. MILLER, JR.,
Sec'y C. P. R. Co.

[L. S.] D. O. MILLS.

[L. S.] WM. E. BARRON.

(Duly acknowledged and recorded.)

58 Said bonds are unpaid and outstanding, but are not yet due and the same now are, and ever since their issue have been, secured by the mortgage aforesaid. Many of said bonds are now, and ever have been, owned by citizens and *bona fide* residents of the State of California, while other of said bonds now are, and ever have been, owned by citizens of the United States, *bona fide* residents of States other than California.

XXV.

Land mortgage.

To further aid in the construction of its railroad, hereinbefore, described, the defendant, on the first day of October, A. D. 1870, made, executed, and delivered a mortgage covering all its said lands acquired under the acts of Congress aforesaid, in the sum of ten million of dollars, a copy of which mortgage is set out in the defendant's answer, and is hereby referred to and made part of this finding. Said mortgage was duly acknowledged and filed for record in the office of the county recorder of the several counties in which said land is situated, at the several times appearing in the several certificates of record endorsed thereon. Under said mortgage the defendant issued bonds in the amount of ten million of dollars. A part of said bonds have been redeemed, but there still remains due and unpaid $5,749,000, which is a valid and subsisting lien upon all of said lands. Some of said unpaid bonds now are, and ever have been, owned and held by citizens and *bona fide* residents of the State of California, and some of said bonds now are, and ever have been, owned by citizens of the United States, *bona fide* residents of States other than the State of California.

The lands covered by said land mortgage are situated in the States of California and Nevada and the Territory of Utah. The aggregate amount of said lands in the State of California is 652,125 acres. Said lands are situated in the following counties, in the quantiy herein set out, as follows: In Sacramento county, 350 acres; in Placer county, 21,621 acres; in Nevada county, 30,595 acres; in Sierra county, 9,665 acres; in Yuba county, 40,664 acres; in Sutter county, 3,008 acres; in Butte county, 150,272 acres; in Tehama county, 217,499 acres; in Shasta county, 114,606 acres; in Colusa county, 27,650 acres; in El Dorado county, 21,314 acres; in Plumas county, 5,704 acres; in Yolo county, $212\frac{26}{100}$ acres.

XXVI.

The lands mentioned in the preceding finding are not, and never have been, in any way connected with the railroad business of the defendant. They are agricultural, grazing and other lands granted to said defendant under the acts of Congress hereinbefore
59 mentioned, for the purposes in said acts provided, held, and owned by said defendant for said purposes.

All of said lands, so far as patented, for each of the years 1880, 1881, and 1882, were assessed by the assessors of the respective counties in which they are situated at their full cash value, and no deduction from said value was made or allowed on account of said mortgage, or the indebtedness secured thereby. On the contrary, the laws of the State of California, under which said assessors acted in making said assessments, prohibited any deduction from said values on account either of the mortgages or the indebtedness secured thereby.

In each of said years the defendant paid in full, at the time the same became payable, all the taxes levied upon said lands for State, county, and municipal purposes, without any deduction on account of mortgage.

XXVII.

At the session of the Legislature of 1881 a bill was introduced in the Assembly of said Legislature, of which the following is a true copy, and that such proceedings were thereupon had in the said Legislature as are hereinafter set forth. Said bill was an amendment to section 3664 of the Political Code of the State of California, which section, prior to said amendment, read as follows, to wit:

"SECTION 3664. On or before the first Monday in May, in each year, the State Board of Equalization shall assess the franchise, roadway, road-bed, rails, and rolling-stock of railroads operated in more than one county. The president, secretary, cashier, or managing agent, or such other officer as the State Board of Equalization may designate, of any corporation operating any railway in more than one county in this State, shall furnish said board, on or before the first Monday of April in each year, a statement, signed and sworn to by one of such officers, showing in detail, for the year ending on the first Monday of March in such year—

(*a.*) The whole number of miles of railway owned, operated, or leased in the State by said corporation making the return, and the value thereof per mile, with a detailed statement of all property of every kind located in the State.

(*b.*) Also a detailed statement of the number and value thereof of engines, passenger, mail, express, baggage, rolling-stock in use on the corporation's line in the State during the year for which the return is made. The return shall show the amount of rolling-stock, the annual gross earnings of the entire railway, and the proportionate annual gross earnings of the same in this State, as nearly as practicable, and all the property designated hereafter in this section, and such other facts as the State Board of Equalization may, in writing, require.

If such officer or officers so designated shall fail to make and furnish such statement, said Board of Equalization shall fix the value of and proceed to assess the property of the corporation so failing. The valuation fixed by them shall be final and conclusive. The said property shall be assessed at its actual value.

Assessments shall be made upon the entire railway within the State, and shall include the right of way, road-bed, track, bridges, culverts, and rolling-stock. The depots, station grounds, shops, buildings, and gravel-beds shall be assessed by the assessor of the county where situated as other property. On or before the fifteenth day of May, in each year, said board shall transmit to the county assessor of each county through which any railway operated in more than one county may run a statement showing the length of the main track, or tracks, of such railway within the county, together with a description of the whole of said tracks within the county, including the right of way by metes and bounds, or other description sufficient for identification, and the assessed value per mile of the same, as fixed by a *pro rata* distribution per mile of the assessed value of the whole franchise, roadway, road-bed, rails, and rolling-stock of such railway within this State.

Said statement shall be entered on the assessment roll of the county. At the first meeting of the board of supervisors, after such statement is received by the county assessor, they shall make and cause to be entered in the proper record book an order stating and declaring the length of the main track, and the assessed value of such railway lying in each city, town, township, school district, or lesser taxing district in their county through which such railway runs, as fixed by the State Board of Equalization, which shall constitute the taxable value of said property for taxable purposes in such city, town, township, school, road, or other district; and the clerk of the board of supervisors shall transmit a copy of each order or equalization to the city council or trustees, or other legislative body of incorporated cities or towns, the trustees of each school district, and the authorized authorities of other taxation districts through which such railway runs. The taxes on said property for State and county purposes, after collection by the county collector, shall be paid over to the county treasurer as other taxes. All such railway property shall be taxable upon said assessment, at the same rates, by the same officers, and for the same purposes as the property of individuals within such counties, cities, towns, townships, school districts, and lesser taxation districts."

And the said amendment is in the following words:

"respectively, any person dissatisfied with an assessment made by said board of equalization against his or its property may, within five days after such assessment is made and entered of record on the books of said board, by written petition apply to said board to have the same corrected in any particular. Said petition must state the grounds of objection to such assessment, and must be filed with the clerk of the board. The board must fix a time for hearing said

petition, which must not be less than five nor more than ten days from the time the same is filed, and must upon such hearing receive such proofs as may be offered by the petitioner, or by the attorney general, or any other person appearing against such petition, and such other proofs as in the judgments of the board bear upon the question at issue. By an order of the board, or upon the demand of the petitioner, the proofs shall be reduced to writing by a phonographic reporter. If the board do not order the proofs to be
61 reduced to writing by such reporter, but the same is done upon the demand of the petitioner, the petitioner must pay the expenses thereof. After hearing such proofs the board shall, within ten days, determine, in writing, upon the matters involved in the petition and proofs, and may alter in conformity with such determination the assessment complained of. Any person feeling aggrieved at such determination who shall pay the tax upon the assessment complained of, and may, within ten days after such payment, bring an action in the superior court in the county in which the tax, or any part thereof, has been paid against the Board of Equalization, and in the complaint may allege any fact averred in his petition filed with said board, showing the illegality of such tax in whole or in part, or that the property in whole or in part was assessed for more than its actual value.

A copy of the complaint must, within thirty days after it has been filed, be served upon the chairman or clerk of said board, and said board shall have thirty days in which to answer or demur to the same. At the time the board answers or demurs it may demand that the suit be tried in the superior court of Sacramento county.

The provisions of the Code of Civil Procedure relating to pleadings, proofs, trials, and appeals, shall be applicable to the proceedings herein provided for, and the testimony taken before the Board of Equalization may be read in evidence; and in such proceeding the court shall have power to determine the matters involved in the issue, and in making such determination may ascertain whether the property was taxed or assessed in proportion to its value, and if the determination is in favor of the petitioner, as to the illegality of the tax in whole or in part in excess of its actual value, it shall, by its judgment, direct the return of the tax paid, or of such part thereof as may have been illegally exacted, or exacted in excess of the actual value of the property.

Upon presentation of a certified copy of such final judgment to the controller, he shall draw his warrant upon the State treasurer for the amount of such judgment, and the treasurer shall pay the same out of any funds in the State treasury not otherwise appropriated. At the next settlement made thereafter by the controller with the county treasurer of any county that received any portion of said illegal tax, he shall require the treasurer thereof to pay such portion into the State treasury to reimburse the State for the advance made on said judgment. The Board of Equalization may direct the district attorney of any or every county interested, and the attorney general, to defend for such board any proceedings commenced under the provisions of this section."

The said amendatory bill was entitled "An act to amend an act to establish a political code, approved March 12, 1872, by adding thereto two new sections, to be known as sections 3664 and 3665, relating to the assessments of the railroads and other property by the State Board of Equalization and county assessors for the purposes of taxation." Said bill, in the due course of business, was passed by the Assembly, and contained all the matter which is found in said section 3664 as first above quoted.

Having passed the Assembly, the bill was transmitted to the Senate. The Senate amended section 3664 by adding thereto
62 the latter portion of the matter hereinbefore quoted. Upon the return of the bill to the Assembly the following proceedings were had, as appears on the Journal of that body:

"The consideration of Senate amendment to Assembly bill No. 475, 'An act to amend an act entitled An act to establish a political code,' approved March 12, 1872, by adding thereto two new sections, to be known as sections 3664 and 3665, relating to assessments of railroads and other property, by the State Board of Equalization and county assessors for the purpose of taxation," resumed.

"The previous question was demanded by Messrs. Edwards, Jackson, and Paulk.

"The ayes and noes were demanded by Messrs. Paulk, Whipple, and Del Valle.

"The roll was called, and the House refused to order the main question, by the following vote:

"Ayes: Messrs. Arick, Brown, Burns, Cameron, Crank, Daggett, Edwards, Gay, Geary, Gilmore, Hartshorn, Hoitt, Holden, Jackson, Jones, Kellogg, Kilburn, Lane, May, McCallion, McClure, McDonald Mein, Mudgett, Noonan, Patterson of San Joaquin, Reddick, Reynolds, Streeter, Swift, Wasson of Ventura, Wasson of Mono, Young, and Mr. Speaker—34.

Noes: Messrs. Baker, of Sacramento, Baker of Yolo, Birney, Bost, Branch, Chandler, Colman, Crumpton, Cunningham, Del Valle, Felton, Fraser, Freer, Garrity, Gavigan, Griffith, Hale, Hendrick, Henshaw, Howard, Keating, Leach, Leake, Lewis, Long, Matthews of Tehama, Matthews of San Benito, McMurray, Murphy, O'Connor, Patterson of Nevada, Paulk, Pinder, Platt, Samuels, Sargent, Siebe, Van Fleet, Wentz, Wertsbaugher, Whipple, and Wood—42."

After the transaction of other business, the printed journal proceeds:

"The consideration of Senate amendment to Assembly bill 475 resumed.

"The question recurred on concurring therewith.

"The ayes and noes were demanded by Messrs. Paulk, Sargent, and Wentz.

"The roll was called, and the Speaker declared the House had concurred in the Senate amendments:

"Ayes: Messrs. Arick, Baker of Sacramento, Birney, Bost, Brown, Burns, Crank, Daggett, Edwards, Estee, Felton, Garrity, Gavigan, Geary, Gilmore, Hartshorn, Hoitt, Holden, Howard, Jackson, Keat-

ing, Kellogg, Laine, Mason, May, McCallion, McClure, McDonald, Mein, Noonan, O'Connor, Patterson of San Joaquin, Pinder, Reddy, Streeter, Swift, Van Fleet, Warkins, Wasson of Mono, Young, and Mr. Speaker—39.

"Noes: Messrs. Alviso, Baker of Yolo, Branch, Chandler, Colman, Cunningham, Del Valle, Fraser, Gay, Griffith, Hale, Hendrick, Henshaw, Jones, Leake, Leach, Lewis, Long, Matthews of San Benito, McMurray, Murphy, Patterson of Nevada, Paulk, Platt, Reynolds, Samuels, Sargent, Siebe, Wasson of Ventura, Wentz, Wertsbaugher, Whipple and Wood—32."

The following is a copy, on the same point and vote, of the original written Journal of the Assembly, deposited in the office of the secretary of State, showing the last action of the House on Senate bill No. 475:

63 *California Legislative Assembly, Twenty-Fourth Session.*

ASSEMBLY CHAMBER, FRIDAY, *March* 4, 1881.

Consideration of Senate amendments to Assembly bill No. 475 resumed.

The question recurred on concurring therewith.

The ayes and noes were demanded by Messrs. Paulk, Sargent, and Wentz. Roll called. The House concurred in Senate amendments by the following vote:

Ayes: Arick, Baker of Sacramento, Birney, Bost, Brown Burns, Crank, Daggett, Estee, Edwards, Felton, Garrity, Gavigan, Geary, Gilmore, Hartson, Hoitt, Holden, Howard, Keating, Kellogg, Lane, Mason, May, McCallion, McClure, McDonald, Mein, Noonan, O'Connor, Patterson of San Joaquin, Pinder, Reddy, Streeter, Swift, Van Fleet, Warkins, Wasson of Mono, Young, and Mr. Speaker—39.

Noes: Alviso, Baker of Yolo, Branch, Chandler, Coleman, Cunningham, Del Valle, Fraser, Gay, Griffith, Hale, Hendrick, Henshaw, Jones, Leach, Leake, Lewis, Long, Matthews of San Benito, McMurray, Murphy, Patterson of Nevada, Paulk, Platt, Reynolds, Samuels, Sargent, Siebe, Wentz, Wasson of Ventura, Wertsbaugher, Whipple, and Wood—32.

Matthews of Tehama and Kilburn paired, Kilburn voting aye and Matthews no. Messrs. Cameron and Crumpton paired; Cameron aye, Crumpton no.

The following facts also appear from the Journal:

Other business having intervened, "the consideration of Senate amendments to Assembly bill No. 475 resumed, the Speaker declaring that this was not the final action on the bill, and that the House had concurred in Senate amendments to Assembly bill No. 475, by a vote of 39 ayes to 32 noes. Mr. Paulk appealed from the decision of the chair, on the ground that forty-one votes were required for concurrence. The question recurred, Shall the decision of the chair stand as the judgment of the house?"

After other business, on motion, the appeal was laid on the table by a vote of 38 ayes to 23 nays.

Mr. Hale then entered his protest against the decision of the Speaker, on the ground that forty-one members voting in the affirmative are necessary to adopt the amendments, the vote on concurring in the amendments being the only action of the House thereon. Thereupon again, "the Speaker stated that the action on the Senate, amendments to the bill was not the final action on the bill, and consequently a concurrence or non-concurrence in the amendments required a majority vote only."

Mr. Griffith and Mr. Kellogg then each entered his protest against the decision of the Speaker, declaring the Senate amendments concurred in, on the ground that a concurrence required a majority of the whole House.

No other vote was had or other announcement by the Speaker made in regard to this bill. No other action was had by the House, except that on March 4, being the last act before adjournment *sine die*, the bill was reported as correctly enrolled, and as having been presented to the Governor for approval. No action was taken on this report, and the bill does not appear to have been reported to the House as having been approved.

64 XXVIII.

The whole of said property assessed by the State Board to the defendant.

The State Board of Equalization, in assessing said value of said property to and against defendant, assessed the full cash value of said railroad, roadway, road-bed, rails, rolling-stock, and franchises, without deducting therefrom the value of the mortgage, or any part thereof, given and existing thereon as aforesaid to secure the indebtedness of said company to the holders of said bonds, notwithstanding they had full knowledge of the existence of said mortgage; and, in making such assessment, the State Board of Equalization did not consider or treat said mortgage as an interest in said property, but assessed the whole value thereof to the defendant in the same manner as if there had been no mortgage thereon.

XXIX.

Other corporations of various kinds.

At, before, and ever since the adoption of the constitution of California, now in force, there were and are existing under the laws of said State corporations of various kinds, formed for the purpose and actually operating and doing business, and holding and using property in more than one county in said State. Corporations in the said State of California now are, and ever have been, formed under general laws relating thereto, and there have ever existed corporations formed under its said laws for fire, marine, mutual life, health, and accident assurance, building ferries, constructing and operating roads, railroads, wagon-roads, telegraphs, bridges, wharves, chutes, and piers, and for constructing and operating canals, for the purpose of acquiring lands in large tracks, and distributing them

as homesteads among the corporators for savings and loans, for mining, for the sale and distribution of water in the cities and towns, for manufacturing, mechanical, and agricultural purposes; for benevolent, charitable, and educational purposes, cemeteries, agricultural fairs, and various other purposes.

There is now, and for more than three years last past has been, a railroad in use and operation, extending from the city of Marysville, in the county of Yuba, to the town of Oroville, in the county of Butte, in said State, a distance of 26½ miles, which said road now is, and ever has been, operated in more than one county in this State, and has the same gauge as the road of this defendant, and has ever been operated in like manner, and for like uses and purposes, and is now, and for more than two and a half years last past has been, in the ownership and under the operation and control of one N. D. Rideout, a natural person and citizen of the United States, and resident of the State of California.

65 XXX.

Rules of equality as regards the system adopted by said board.

The State Board of Equalization, in making the supposed assessment of said railway of defendant, did knowingly and designedly include in the valuation of said roadway the value of fences erected upon the line between said roadway and the land of coterminous proprietors. Said fences were valued at $300 per mile.

XXXI.

The Legislature of the State of California, on the 27th day of March, A. D. 1862, passed an act entitled "An act to provide for the construction of a railroad from Mokelumne City to Woodbridge, in the county of San Joaquin," which act is found in the statutes of California for 1862, at page 97, and is hereby made a part of this finding.

On the 29th day of March, A. D. 1878, the Legislature of the State of California passed an act entitled "An act to provide for the construction of a railroad from the town of Truckee, Nevada county, to Tahoe City, Lake Bigler, in Placer county, and to regulate fares and freights thereon," which act is found in the statutes of California for 1877–'8, at page 698 *et seq.*, and is hereby made a part of this finding.

At the same session said Legislature passed another act on the 30th day of March, A. D. 1878, entitled "An act to provide for the construction of a railroad from Ione, in the county of Amador, to a point in or near the towns of Sutter Creek or Jackson, in said county, and to regulate fares and freights thereon," which act is found in the same volume of said statutes of California, at page 841 *et seq.*, and is hereby referred to and made a part of this finding.

Numerous other acts of a similar character are found scattered through the annual volumes of the statutes of California. It does not appear from the evidence whether said acts have been acted upon by the grantees therein named or not.

XXXII.

The California Northern railway is a railway having the standard gauge of four feet eight inches and a half, being the same gauge as that of the Southern Pacific railroad of California, extending from Marysville, in Yuba county, to Oroville, in Butte county, a distance of twenty-six and one-half miles, twelve and one-half miles being in Yuba and fourteen in Butte county, built and formerly owned and operated by the California Northern Railway Company, a corporation organized under the laws of California. On the 30th
66 day of July, A. D. 1881, the said railway was sold under a decree of foreclosure of mortgage upon said road, and at said sale purchased by N. D. Rideout, a natural person, who received a conveyance thereof in pursuance of said sale, went into possession thereof, and has ever since, being about two years and a half, possessed and operated, and he is now possessed of and operating, said railway, claiming to be the owner thereof under said decree of foreclosure and sale, and since said sale said railway has been assessed, or purported to be assessed, to, and the taxes claimed to have been levied thereon have been paid by, said Rideout.

XXXIII.

The distance of two miles from the wharf at the end of the road of defendant in San Francisco, across the bay of San Francisco to the wharf at the end of said defendant's road at Oakland, Alameda county, over which part of the bay freight is carried by said defendant, upon steamers owned by said defendant, and used for the purposes of said railroad, was assessed to said defendant as two miles of said road, at the said amount per mile as any other equal portion of said road, said two miles across said bay constituting two miles of the aggregate of 602.22 miles of said railroad assessed to defendant, and in so assessing said two miles of the bay the said board followed the statement filed by said defendant, and made said assessment in accordance therewith.

XXXIV.

The defendant, by its agent, appeared before the Board of Equalization, both before and after said assessment was made by said board, and asked to have the said assessment reduced, but after having been heard, the board refused to reduce said assessment. The ground of refusal does not appear, the defendant having offered to show the ground of refusal by the testimony of one of the members of said board, and said testimony having been excluded as incompetent by the court upon the objection of plaintiff.

XXXV.

There was no testimony or facts in the case other than appears in these findings to countervail the effect or legal operation of any of the documents stated in these findings.

Conclusions of Law.

From the foregoing facts the court finds, as a conclusion of law, that the defendants are entitled to judgment in their favor, with costs.

January 21, 1884.

(Signed) FIELD, *Circuit Justice.*
(Signed) SAWYER, *Circuit Judge.*

Endorsed: Filed January 22, 1884. L. S. B. Sawyer, clerk.

67 *Judgment.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of California.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY. } No. 2845.

This cause having come on regularly for trial on the 31st day of July, 1883, being a day in the July, 1883, term of said court, before the court, sitting without a jury, a trial by jury having been waived by stipulation of the attorneys for the respective parties duly filed with the clerk of said court, Hon. E. C. Marshall, attorney general of the State of California, appearing as attorney, and A. L. Rhodes and D. S. Terry, Esqs., as counsel for plaintiff, and H. S.
68 Brown and P. D. Wigginton, Esqs., as counsel for defendant, and the trial having been proceeded with on the 1st, 2d, 3d, 7th, 8th, 9th, 10th, 14th, and 15th days of August of said term and year, and witnesses on the part of the plaintiff and of the defendant having been sworn and examined, and documentary evidence on behalf of the respective parties having been introduced, and the evidence being closed, the cause, after arguments of counsel having been submitted to the court for consideration and decision, and the court, after due deliberation, having filed its finding, and ordered that judgment be entered in accordance therewith—

Now, therefore, by virtue of the law and the finding aforesaid, it is considered by the court that the people of the State of California, plaintiff, take nothing by this action; that the Central Pacific Railroad Company, defendant, go hereof without day, and that the said defendant recover from said plaintiff its costs in this
69 behalf expended, taxed at ——.

Judgment entered January 22, 1884.

L. S. B. SAWYER, *Clerk.*

I hereby certify that the foregoing is a full and correct copy of an original judgment entered in the above-entitled cause.

Attest my hand and the seal of said circuit court, this 22d day of January, A. D. 1884.

[SEAL.] L. S. B. SAWYER, *Clerk.*

Endorsed: Filed January 22, 1884. L. S. B. Sawyer, clerk.

70 *Clerk's Certificate.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of California.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit within and for the district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the therein-entitled action.

Witness my hand and the seal of said circuit court, this 22d day of January, A. D. 1884.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By F. D. MONCTON,
Deputy Clerk.

71 Endorsed: Judgment roll. Filed 22 January, 1884. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

72 *Order Striking Out Portions of Answer.*

At a stated term, to wit, the July term, A. D. 1883, of the circuit court of the United States of America of the ninth judicial circuit in and for the district of California, held at the court-room, in the city and county of San Francisco, on Thursday the 19th day of July, in the year of our Lord one thousand eight hundred and eighty-three.

Present: Honorable Stephen J. Field, Associate Justice of the Supreme Court of the United States; Honorable Lorenzo Sawyer, circuit judge.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY. } No. 2845.

73 The motion, heretofore argued and submitted, to strike out portions of the amended answer herein having been duly considered, it is ordered that all that portion of the amended answer contained in articles 23, 35, 36, 37, 38, and 40, and the third paragraph of article 27, and all of article 29, after the first two paragraphs, be stricken out of said answer as being matters of evidence, or immaterial matter. In other particulars the motion is denied.

To this order the defendant excepts; and to the refusal of the court to strike out other matter the plaintiff excepts.

74 *Opinion.*

The taxation of property of railroad companies in California as affected by the Fourteenth Amendment of the Federal Constitution.

Opinions of Justice Field and Judge Sawyer, delivered in the U. S. circuit court at San Francisco September 17th, 1883. Printed from a revised and official copy.

75 In the Circuit Court of the United States, Ninth Circuit, District of California.

COUNTY OF SANTA CLARA
vs.
SOUTHERN PACIFIC RAILROAD COMPANY,

COUNTY OF SACRAMENTO
vs.
CENTRAL PACIFIC RAILROAD COMPANY,

And other similar tax cases.

Syllabus.

1. The property and franchises of the Southern Pacific Railroad Company and of the Central Pacific Railroad Company, corporations created under the laws of California, though the companies are employed by the General Government for postal and military purposes, and were aided by land grants and loans in the construction of their roads, are not exempt from State taxation, in the absence of Congressional legislation declaring such exemption. It is competent for Congress to exempt any agencies it may employ for services to the General Government from such taxation as will, in its judgment, impede or prevent their performance.

2. The Fourteenth Amendment of the Constitution, in declaring that no State shall deny to any person within its jurisdiction the "equal protection of the laws," imposes a limitation upon the exercise of all the powers of the State which can touch the individual or his property, including that of taxation.

3. The "equal protection of the laws" to any one implies not only that the means for the security of his private rights shall be accessible to him on the same terms with others, but also that he shall be exempt from any greater burdens or charges than such as are equally imposed upon all others under like circumstances. This equal protection forbids unequal exactions of any kind, and among them that of unequal taxation.

76 4. Uniformity in taxation requires uniformity in the mode of assessment as well as in the rate of percentage charged.

5. The thirteenth article of the constitution of California declares that "a mortgage, deed of trust, contract, or other obligation by which a debt is secured shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby," and that, "except as to railroad and other *quasi-*

public corporations," the value of the property affected, less the value of the security, shall be assessed and taxed to its owner, and that the value of the security shall be assessed and taxed to its holder, and that the taxes so levied shall be a lien upon the property and security, and may be paid by either party to the security; that if paid by the owner of the security, the tax levied upon the property affected thereby shall become a part of the debt secured; and if the owner of the property shall pay the tax levied on the security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof. In the assessment of property of the defendants—railroad companies—the mortgages thereon were not deducted, but the whole value of the property, notwithstanding the mortgages thereon, was assessed, and the property taxed according to such assessment, to those companies: Held (1), treating the mortgages as transferring a taxable interest in the property, that in assessing against the company the interests with which they had at the time parted by their mortgages, and taxing them upon that assessment, was a proceeding to take the property of the companies without due process of law; and (2) treating the mortgages as a lien or incumbrance upon the property, that by not deducting their amount in the assessment of the value of the property of the railroad companies for taxation, as is done in the valuation of property of natural persons, when subject to a mortgage, there was a discrimination against the companies, which resulted in imposing a greater burden upon their property than is imposed upon the property of natural persons.

6. Persons do not lose their right to equal protection guaranteed by the Fourteenth Amendment to the Federal Constitution when they form themselves into a corporation under the laws of California.

7. The State possesses no power to withdraw corporations from the guaranties of the Federal Constitution. Whatever property a corporation lawfully acquires is held under the same guaranties which protect the property of natural persons from spoliation.

8. Under the reserved power to amend, alter, or repeal the laws under which private corporations are formed, the State cannot exercise any control over the property of a corporation, except such as may be exercised through control over its franchise, and over like property of natural persons engaged in similar business.

9. The proceeding for the assessment of property—that is, the ascertainment of its value upon evidence taken—is judicial in its character, and to its validity the law authorizing it must provide some kind of notice, and an opportunity to be heard respecting it, before the proceeding becomes final, or it will want the essential ingredient of due process of law. The notice may be given by personal citation or by statute. It is usually given by a statute prescribing a time and place where parties may be heard before boards appointed for the correction of errors in assessment.

77

10. The constitution of California (section 15, article IV) provides that "on the final passage of all bills they shall be read at length, and the vote shall be by yeas and nays upon each bill separately,

and shall be entered on the journal, and no bill shall become a law without the concurrence of a majority of the members elected to each house." Under this provision the court, to inform itself, will look to the journals of the Legislature, and if it appears therefrom that the bill did not pass by the constitutional majority, then it will not be regarded as a law. Sawyer, J.

11. The journals of the Legislature show that the act of March 14, 1881, mentioned in the opinion, never became a law. Sawyer, J.

12. Where the original written journals on file in the office of the secretary of State differ in any material particular from the printed journals, the original written journals are the authentic official records, and must control. Sawyer, J.

Counsel for plaintiffs: E. C. Marshall, att'y gen. of California; D. M. Delmas, D. S. Terry, A. L. Rhodes, James A. Waymire, W. T. Baggett, J. H. Campbell, dist. att'y of Santa Clara Co.; J. T. Carey, dist. att'y of Sacramento Co., and J. M. Lesser, dist. att'y of Santa Cruz Co.

Counsel for defendants: S. W. Sanderson, J. N. Pomeroy, T. I. Bergin, H. S. Brown, S. C. Denson, and P. D. Wiggington.

78 Opinion of the court.

By the court: FIELD circuit justice:

These are actions for the recovery of unpaid State and county taxes levied upon certain property of the several defendants, either for the fiscal year of 1881 or of 1882, and alleged to be due to the plaintiffs, with an additional five per cent. as a penalty for their non-payment and interest. The defendants are corporations formed under the laws of California, and the taxes claimed were levied on the franchise, roadway, road-bed, rails, and rolling-stock of each of them as an unit, without separation or distinction in the valuation of the different parts composing the whole. To two of the corporations, the Southern Pacific Railroad Company and the Central Pacific Railroad Company, privileges and powers other than those acquired under the laws of the State were conferred by grant of the General Government, and for them obligations and burdens were assumed not contemplated nor possible under their original organization.

It is contended that Congress has selected these corporations as the special agents and instruments of the nation for public purposes, and to that end has clothed them with faculties, powers, and privileges to enable them to construct and maintain their roads as postal and military roads of the Government; that the State by an act of its Legislature has assented to the acceptance of these faculties, powers,
and privileges, and that the companies in consideration there-
79 of have assumed obligations to the General Government with the discharge of which the State cannot interfere; that the power to tax their franchises involves the power to destroy the companies, and thus deprive the General Government of the benefit of the roads, for the construction and maintenance of which its grants were made; that the existence and exercise of the power on the part of the State are therefore incompatible with the duties devolved upon

and assumed by the companies to the United States. Hence it is claimed by counsel that the tax levied upon the franchises of the defendants is illegal and void, and they refer to numerous decisions of the Supreme Court, which hold, in general language, that an agency of the United States, an instrumentality by which the Federal Government discharges its obligations to the people of the country, cannot be taxed by any State or subordinate authority. Certainly no State can impede or embarrass the Federal Government in its operations, as might be done if it could impose a tax upon the necessary means adopted for their execution; nor can the Federal Government impede or embarrass the operations of the State governments, as it might do if it could impose a tax upon the necessary means adopted by them in the exercise of their powers.

The two governments have supreme authority within their respective spheres, and within them neither can interfere with the other. On this principle it was held by the Supreme Court that the State could not levy a tax upon the salary or emoluments of an officer of the United States, nor could the United States impose a tax upon the salary of a State judge. (Dobbins *vs.* Commissioners of Erie County, 16 Peters, 435; Collector *vs.* Day, 11 Wall., 113.) Both officers were necessary agents, instrumentalities for exercising the powers of their respective governments, and to tax the salary of either was to impair the means by which he could exist and maintain his office. In both cases, as observed by Mr. Justice Nelson,

the exemption from taxation was "upheld by the great law
80 of self-preservation, as any government whose means employed in conducting its operations is subject to the control of another can exist only at the mercy of that Government."

The correctness of this general principle is not controverted, and cannot be in the face of the numerous decisions of the Supreme Court, when applied to the means or instrumentalities created by the Federal Government, or existing under its laws, for the exercise of its powers, such as officers of its courts in the administration of justice, or fiscal agents in the collection, custody, or distribution of its funds. But we are unable to accede to the position that every agent or instrument which the United States may see fit to employ is thereby exempted from the common burdens of the State in which it may be found or used, in the absence of specific Congressional legislation declaring such exemption. The coach employed to carry the mail, or the ferry-boat to convey it across a navigable stream, would hardly, by reason of this employment alone as an instrumentality of the General Government, be considered as withdrawn from the taxing power of the State. As well observed by Chief Justice Chase, with reference to the exemption from State taxation claimed by the Kansas Division of the Pacific Railroad Company for its property, no limits can be perceived to the principle of exemption which the companies thus seek to establish. "Every corporation," he added, "engaged in the transportation of mails, or of Government property of any description, by land or water, or in supplying materials for the use of the Government, or in performing any service of whatever kind, might claim the benefit of the

exemption. The amount of property now held by such corporations, and having relations more or less direct to the National Government and its service, is very great. And this amount is continually increasing; so that it may admit of question whether the
81 whole income of the property which will remain liable to State taxation, if the principle contended for is admitted and applied in its fullest extent, may not ultimately be found inadequate to the support of the State governments." (Thompson *vs.* Pacific Railroad, 9 Wall., 579, 591.)

It is true, that in the case from which this citation is made exemption from taxation was claimed only for the property, the road, and rolling-stock of the company. Here the exemption claimed is of the franchises of the corporations, their right to exist and maintain their roads. But it is not perceived that this difference between the cases can affect the rule which was there laid down, that unless Congress interposes and creates the exemption the taxing power of the State is not restrained; for if the roads and rolling-stock can be taxed, and, if the taxes are not paid, can be sold, the ability of the companies to discharge their obligations as agents of the Government would be as effectually destroyed as by the taxation and sale of their franchises. The possession of the roads and rolling-stock is as essential as the possession of the franchises.

The objection presented by counsel is not free from difficulty. At one time I thought that it was tenable, and so expressed myself by joining in the dissent in Railroad Company *vs.* Peniston, reported in 18 Wallace; but on further consideration, I have come to the conclusion that the rule laid down in Thomson's case is the true and sound rule. The State, it is conceded, cannot use its taxing power so as to defeat or burden the operations of the General Government; and when that Government has itself created the instrumentality used, its exemption from State taxation necessarily follows. But we are of opinion, yielding to the decision cited, that when the instrumentality is the creation of the State—a corporation formed under its laws—and is employed or adopted by the General Government for its convenience, although to enlarge its use and render it more available additional privileges and benefits
82 are conferred by that Government upon the corporation, it remains subject to the taxing power of the State, unless Congress declares it to be exempt from such power. Congress can undoubtedly exempt any agencies it may employ for services to the General Government from such taxation as will in its judgment impede or prevent their performance. Occasions may arise hereafter, especially in time of war, where the necessities of the Federal Government will require such exemption of the roads of the companies and of their franchises and appurtenances to be declared and enforced, the exemption to continue until the necessities calling for it shall cease. But as yet Congress has not declared any such exemption, either of their property or of their franchises; and we, therefore, think that none exists.

Of the other defences interposed to the claim of the plaintiffs, some are founded upon an alleged neglect of the assessing officers

to comply with the requirements of the laws of the State, and some upon the alleged conflict of provisions of the State constitution, under which they acted, with requirements of the Federal Constitution. Of the former are objections to what is termed the lumping character of the assessment; that is, the blending of the different items composing the whole into one valuation, namely, the value of the franchise, roadway, road-bed, rails, and rolling-stock, without any designation of the value of each distinct part; and to the including in the roadway of property not properly appertaining to it, such as fences on its sides belonging to adjoining proprietors, and, so far as the roadway of the Central Pacific Company is concerned, to the including in the estimate of its length the four miles of the bay between the road in the county of San Francisco and the wharf in Alameda county. The value of the fences is included in the valuation of the roadway of each company. The distance across the bay of San Francisco is added to the length of the road assessed to the Central Pacific Company, and is assessed as of equal value
83 per mile with the rest of the road. It is also contended that the land composing the roadway, and the rails laid thereon, should have been separately assessed; the latter as improvements under the constitution of the State, which requires "land and improvements thereon" to be separately assessed. An objection is also taken to those cases in which the people of the State are plaintiffs, that the statute under which they were brought was repealed in 1880, and that after that period actions for unpaid taxes could be brought only in the name of the county. We do not, however, deem it important to pass upon these and other objections to the assessment, arising from an alleged disregard of the laws of the State. We shall confine ourselves to the defences made to the assessment and tax from the alleged conflict of the provisions, under which they were levied, with the requirements of the Fourteenth Amendment to the Constitution of the United States, which declare that no State shall "deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The railroad companies contend that both inhibitions of this amendment were violated in the assessment and taxation of their property.

The constitution of California provides for taxes on property, on incomes, and on polls. The taxation on property, with which alone we are concerned in this case, is to be in proportion to its value. There is no provision for levying a specific tax upon any article or kind of property. It declares that all property not exempt under the laws of the United States shall, with some exceptions, be taxed according to its value, to be ascertained as prescribed by law; and that the word "property" shall "include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership."

It also declares that a "mortgage, deed of trust, contract, or
84 other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby." And that, "except as

to railroads and other *quasi*-public corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof." It also provides that "the taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof."

By the constitution not only is the ad valorem rule established for the taxation of property, but provision is also made for its assessment. The franchise, roadway, road-bed, rails, and rolling-stock of railroads operated in more than one county are to be assessed by a special board termed the State Board of Equalization. All other property is to be assessed in the county in which it is situated. The supervisors of each county are constituted a board of equalization of such taxable property, and must act upon prescribed rules of notice to its owners. The State board is authorized to act not only as assessor of the franchise, roadway, road-bed, rails, and rolling-stock of the railroads mentioned, but as a Board of Equalization of the taxable property in the several counties, so that equality may be secured between the taxpayers of different localities. Its action in this latter character must also be upon prescribed rules of notice. But though the officers by whom the assessment of these properties is to be made be different, the properties are subject to the same rule of taxation; that is, they are to be taxed in proportion to their value.

In fixing, however, the liabilities of parties to pay the tax
85 assessed and levied upon properties subject to a mortgage, and in estimating the value of such properties as the foundation for the tax, a discrimination is made between the property held by railroad and *quasi*-public corporations and that held by natural persons and other corporations. A mortgage, as seen by the provisions of the constitution quoted above, is deemed and treated, for the purposes of assessment and taxation, as an interest in the property affected. At common law a mortgage of property is a conveyance of the title, subject to a condition that if the debt secured be paid as stipulated the conveyance is to become inoperative. Until the debt secured is paid the title is in the mortgagee. By the constitution a mortgage, for the purposes of assessment and taxation, operates in like manner to transfer the mortgagor's interest to the extent represented by the amount secured. If such amount be half the value of the property, the taxable interest of the mortgagee is an undivided half interest in the property; if the amount equal or exceed the whole value of the property, the taxable interest of the mortgage embraces the entire property. The value of the security can never exceed the value of the property mortgaged; it may be less, and is so if the amount secured be less than such value.

Now, under the constitution, when, by the execution of a mort-

gage, a taxable interest in the property held by natural persons or by corporations other than railroad or *quasi*-public is transferred by the owner to another party, or the whole taxable interest is vested in him, the holder alone of such interest is taxed for it. It is assessed against him as the owner of it, and against him alone could it be justly assessed. But when, by a mortgage on the property of a railroad or a *quasi*-public corporation, a taxable interest in such property is transferred by the corporation to another, or the whole interest is vested in him, the holder of such interest is exempted from taxation for it, and the corporation is assessed and taxed for it, notwithstanding the transfer. No account is taken of the
86 transfer of the taxable interest in the estimate of the value of the property. It is still assessed and taxed to the original holder.

The discrimination thus made will more clearly appear by an illustration of the practical operation of the provisions. If, for example, A, owning property worth $20,000, should execute a mortgage thereof to the Nevada Bank, in San Francisco, to secure $10,000, the bank would hold a taxable interest in that property to the amount of an undivided half. Its liability for taxation would be precisely as though an absolute conveyance of an undivided half interest had been made to it. And the constitution, as seen above, requires that each owner shall pay the tax on his separate interest; and if he pay the tax chargeable on the interest of the other, he shall be allowed for it, either by an addition to the mortgage debt or a discharge of a portion of that debt according as he is the one or the other party to the security. No one would pretend that the mortgagor should pay without such allowance the tax chargeable to the bank, nor that the bank should pay the tax chargeable to the mortgagor, except upon like condition. It would be difficult to state any principle which would justify the exaction from one of a tax leviable on the interest of the other. No power in any State has ever been asserted going to that extent, except the power to confiscate. The exaction would not be the taking of property by due process of law, even upon the theories as to what constitutes such process asserted in this case; it would be sheer spoliation by arbitrary power.

If, however, a railroad corporation should execute its mortgage to the Nevada Bank to secure a loan equal to half or the whole of the value of its property, and thus transfer to the bank a portion or the whole of its taxable interest in the property, that which is thus condemned as sheer spoliation would be enforced, if effect be given to the constitution as it is written. The taxable interest in that
87 case held by the bank would not be assessed nor taxed to the bank. If the mortgage should be for half of the value of the property, the railroad company would still have to pay the tax on the interest transferred, and would not be allowed any credit on the mortgage for the amount paid. If the mortgage should be equal to or exceed the whole value of the property, the railroad company, which would not in such a case hold any taxable interest in the property—no more than if it had been previously transferred by an

absolute conveyance—would still be required to pay the tax upon it, and without any credit for the payment. On what principle, or by what species of reasoning, a tax upon property can be upheld and enforced against a party, be the party a natural or artificial person, when the taxable interest in it had, at the time of the levy of the tax, been transferred to another, I am at a loss to understand. This position of the case was suggested to counsel on more than one occasion during the argument; but no answer was made to it. To every other position an answer was attempted, but to this one none; and, as we think, for the best of reasons, because none was possible, unless indeed it be held that the constitution does not mean what in express language it declares, that a mortgage "shall for the purposes of assessment and taxation be deemed and treated as an interest in the property affected thereby."

Under the provisions of the constitution cited, the property of the several railroad companies, defendants in these cases, was assessed and taxed; and in such assessment and taxation, all the injurious discriminations mentioned were applied against the companies, as will appear by a statement of the proceedings. In considering them, it will tend to clearness and brevity, if we confine what we have to say principally to the case of Santa Clara county against the Southern Pacific Railroad Company. The circumstances distinguishing the other cases from it do not affect the questions involved.

88 The Southern Pacific Railroad Company operates a railroad through several counties. The entire length of the road is somewhat over 711 miles, of which 59 miles and three-tenths of a mile are in the county of Santa Clara. The principal place of business of the company is in the city of San Francisco. Its stockholders are citizens of the United States, some of whom reside in California and some in other States. On the 1st of April, 1875, it was indebted to divers persons in large sums of money advanced for the construction and equipment of its road; and to secure this indebtedness and to complete the construction and equipment it executed and delivered to certain parties, D. O. Mills and Lloyd Tevis, of the city and county of San Francisco, a mortgage upon its road, franchises, rolling-stock, and appurtenances, and upon a large number of tracts of land, situated in different counties, aggregating over 11,000,000 acres, which were the property of the company. The indebtedness amounted to the sum of $32,520,000, and consisted of various bonds of the company. A portion of these bonds, amounting to about $1,632,000, has been paid; and so has the accruing interest on all of them. The balance of the bonds, amounting to about $30,898,000, remains a subsisting indebtedness. This mortgage was soon afterwards placed on record in the office of the recorder of deeds in the several counties of the State in which the property is situated.

The State Board of Equalization assessed the franchise, roadway, road-bed, rails, and rolling-stock of that portion of the road which is designated as its main branch, being $160\frac{84}{100}$ miles in length, at $2,412,600, making $15,000 a mile, and apportioned to the county of Santa Clara $889,500. Upon this amount thus assessed and appor-

tioned the taxes were levied for which the action of that county is brought. Another portion of the road, designated as the Southern Division, was assessed in a similar manner, and the amount apportioned to the different counties through which the road passed. In making the assessment of the different portions no deduction
89 was allowed for the mortgage thereon. No account was taken of the mortgage; it was not treated as an interest in the property, nor as affecting in any way the liability of the mortgagor for the tax. If a natural person had executed the mortgage, it being for an amount exceeding the value of the property, the whole taxable interest would have been treated as in the mortgagees, and they alone would have been assessed and taxed; they alone would have been held amenable to a personal action for the taxes. If the mortgagor had paid the taxes to prevent a sale of the property, the amount paid would have been credited on the mortgage. It can hardly require further illustration to show the discrimination against railroad companies in the matter of taxation, where property is subject to a mortgage. Not only is the company taxed in such a case for interests it does not possess, but it is not allowed any credit by those who do possess the interests for the amount exacted.

The same discrimination will appear against railroad companies in the taxation of their property, if we treat mortgages thereon, not as interests in the property, which the constitution declares they shall be deemed and treated to be, but as mere liens or incumbrances thereon. The basis of all *ad valorem* taxation is necessarily the assessment of the property, that is, the estimate of its value. Whatever affects the value necessarily increases or diminishes the tax proportionately. If, therefore, any element which is taken into consideration in the valuation of the property of one party be omitted in the valuation of the property of another, a discrimination is made against the one and in favor of the other, which destroys the uniformity so essential to all just and equal taxation. Such an element exists where in the assessment of property subject to a mortgage, the value of the mortgage is deducted if the property be owned by a natural person, and is not deducted if owned by a railroad corporation. And the constitution of the State declares that in the ascertainment of values as the basis of taxation such
90 deduction shall be allowed in the one case and denied in the other. Instances of every-day occurrence will show the effect of this discrimination in a clear light. A natural person and a railroad company own together a parcel of property in equal proportions subject to a mortgage. In estimating the value of the undivided half belonging to the natural person half of the amount of the mortgage is deducted. In estimating the value of the undivided half belonging to the railroad company no part of the mortgage is deducted. The discrimination is made against the company for no other reason than its ownership. Take another instance: A natural person and a railroad company own tracts of land adjoining each other, of the same quantity and of equal fertility and richness, both being subject to a mortgage. In the estimate of the value of the property belonging to the natural person the amount of the mort-

gage is deducted; in the estimate of the value of the property belonging to the railroad company the mortgage is not deducted. Of course, the valuation of the latter and consequent tax is proportionately increased; and this discrimination is made solely because of the ownership of the property. Should these two owners exchange their lands the valuation made would change with the ownership. Should the railroad company sell its tract to an individual the assessing officers would at once be bound to return a different valuation of the property as a basis for taxation. Every one sees that the valuation has not in fact changed with the ownership, and, therefore, that the discrimination is made solely because a rule is adopted in the assessment of the property of one party different from that applied in the assessment of the property of the other, purely on account of its ownership. A corresponding difference in the tax which the different owners must pay follows the assessment. Thus, if two adjoining tracts are subject to a mortgage each for half its value, the natural person owning one of them pays a tax on the other half, while the corporation must pay a tax on the whole
91 of its tract, that is, double the tax of the individual. Thus, if each tract be worth $100,000, subject to a mortgage of $50,000, and the rate of taxation be two per cent., the tax of the individual will be $1,000; the tax of the corporation will be $2,000. If, then, these owners should exchange their lands, the property which this year is thus taxed at $1,000, will next year be taxed at double the amount; and the other tract, this year taxed at $2,000, will next year be taxed at one-half that sum. The property which is now half exempt will then be subject to taxation to its full value; and that which is now taxable at its full value will then be half exempt; and all this change in valuation without any change in the character or use of the property, but solely on account of the change in its ownership.

The principle which sanctions the elimination of one element in assessing the value of property held by one party, and takes it into consideration in assessing the value of property held by another party, would sanction the assessment of the property of one at less than its value—at a half or a quarter of it—and the property of another at more than its value—at double or treble of it—according to the will or caprice of the State. To-day, railroad companies are under its ban, and the discrimination is against their property. To-morrow, it may be that other institutions will incur its displeasure. If the property of railroad companies may be thus sought out and subjected to discriminating taxation, so, at the will of the State by a change of its constitution, may the property of churches, of universities, of asylums, of savings banks, of insurance companies, of rolling and flouring mill companies, of mining companies, indeed of any corporate companies existing in the State The principle which justifies such a discrimination in assessment and taxation, where one of the owners is a railroad corporation and the other a natural person, would also sustain it where both owners are natural persons. A mere change in the State constitution

would effect this if the Federal Constitution does not for-
92 bid it. Any difference between the owners, whether of age, color, or race or sex, which the State might designate, would be a sufficient reason for the discrimination. It would be a singular comment upon the weakness and character of our Republican institutions if the valuation and consequent taxation of property could vary according as the owner is white or black or yellow, or old or young, or male or female. A classification of values for taxation upon any such ground would be abhorrent to all notions of equality of right among men, Strangely, indeed, would the law sound in case it read that in the assessment and taxation of property a deduction should be made for mortgages thereon if the property be owned by white men or by old men, and not deducted if owned by black men or by young men; deducted if owned by landsmen, not deducted if owned by sailors; deducted if owned by married men, not deducted if owned by bachelors; deducted if owned by men doing business alone, not deducted if owned by men doing business in partnerships or other associations; deducted if owned by trading corporations, not deducted if owned by churches or universities; and so on, making a discrimination whenever there was a difference in the character or pursuit or condition of the owner. To levy taxes upon a valuation of property thus made is of the very essence of tyranny, and has never been done except by bad governments in evil times, exercising arbitrary and despotic power.

Until the adoption of the Fourteenth Amendment there was no restraint to be found in the Constitution of the United States against the exercise of such power by the States. In many particulars the States were previously limited; their sovereignty was a restricted one. They could not declare war nor make treaties of peace. They could not enter into compacts with each other. They could not pass a bill of attainder nor an *ex post facto* law, nor a law impair-
ing the obligation of contracts. They could not interfere
93 with the exercise of the powers nor obstruct the laws of the Federal Government. But in many other particulars the power of the States was supreme, subject to no control by the Constitution of the United States. The original amendments were only limitations upon the Federal Government, and did not affect the States. Among the powers still held by the States was the power of taxation. When not interfering with any power or purpose or agent of the Federal Government, there was no limitation upon its exercise. Except as restrained by their own constitutions, the States might impose taxes upon any property within their jurisdiction, and as said in the Delaware Tax Case, (18 Wall., 231), the manner in which its value was assessed and the rate of taxation, however arbitrary or capricious, were mere matters of legislative discretion; and it was not for the court to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the Legislature of the State.

The first section of the Fourteenth Amendment places a limit upon all the powers of the State, including among others that of taxa-

tion. After stating that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside, it declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person (dropping the designation citizen) of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The amendment was adopted soon after the close of the civil war, and undoubtedly had its origin in a purpose to secure the newly-made citizens in the full enjoyment of their freedom. But it is in no respect limited in its operation to them. It is universal in its application, extending its protective force over all men of every race and color, within the jurisdiction of the States throughout the
94 broad domain of the Republic. A constitutional provision is not to be restricted in its application because designed originally to prevent an existing wrong. Such a restricted interpretation was urged in the Dartmouth College case to prevent the application of the provision prohibiting legislation by States impairing the obligation of contracts to the charter of the college, it being contended that the charter was not such a contract as the prohibition contemplated. Chief Justice Marshall, however, after observing that it was more than possible that the preservation of rights of that description was not particularly in view of the framers of the Constitution when that clause was introduced, said: "It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous or repugnant to the general spirit of the instrument as to justify those who expound the Constitution in making it an exception." (4 Wheat., 494.) All history shows that a particular grievance suffered by an individual or a class from a defective or oppressive law, or the absence of any law touching the matter is often, the occasion and cause for enactments, constitutional or legislative, general in their character, designed to cover cases not merely of the same, but all cases of a similar nature. The wrongs which were supposed to be inflicted upon or threatened to citizens of the enfranchised race by special legislation directed against them moved the framers of the amendment to place in the fundamental law of the nation provisions not merely for the security of those citizens, but to insure to all men, at all times
95 and at all places, due process of law, and the equal protection of the laws. Oppression of the person and spoliation of property by any State were thus forbidden, and equality before the law was secured to all. In the argument of the San Mateo case, in the Supreme Court, Mr. Edmunds, who was a member of the Senate when the amendment was discussed and adopted

by that body, speaking of its broad and catholic spirit, said: "There is no word in it that did not undergo the completest scrutiny. There is no word in it that was not scanned, and intended to mean the full and beneficial thing that it seems to mean. There was no discussion omitted; there was no conceivable posture of affairs to the people who had it in hand" which was not considered. And the purpose of this long and anxious consideration was that protection against injustice and oppression should be made forever secure—to use his language—"secure, not according to the passion of Vermont or of Rhode Island or of California, depending upon their local tribunals for its efficient exercise, but secure as the right of a Roman was secure, in every province and in every place, and secure by the judicial power, the legislative power, and the executive power of the whole body of the States and the whole body of the people."

With the adoption of the amendment the power of the States to oppress any one under any pretence or in any form was forever ended; and henceforth all persons within their jurisdiction could claim equal protection under the laws. And by equal protection is meant equal security to every one in his private rights—in his right to life, to liberty, to property, and to the pursuit of happiness. It implies not only that the means which the laws afford for such security shall be equally accessible to him, but that no one shall be subject to any greater burdens or charges than such as are imposed upon all others under like circumstances. This protection attends every one everywhere, whatever be his position in society or his association with others, either for profit, improvement, or
96 pleasure. It does not leave him because of any social or official position which he may hold, nor because he may belong to a political party, or to a religious society, or be a member of a commercial, manufacturing, or transportation company. It is the shield which the arm of our blessed Government holds at all times over every one, man, woman, and child, in all its broad domain, wherever they may go and in whatever relations they may be placed. No State—such is the sovereign command of the whole people of the United States—no State shall touch the life, the liberty, or the property of any person, however humble his lot or exalted his station, without due process of law; and no State, even with due process of law, shall deny to any one within its jurisdiction the equal protection of the laws.

Unequal taxation, so far as it can be prevented, is, therefore, with other unequal burdens, prohibited by the amendment. There undoubtedly are and always will be more or less inequalities in the operation of all general legislation, arising from the different conditions of persons, from their means, business, or position in life, against which no foresight can guard. But this is a very different thing, both in purpose and effect, from a carefully devised scheme to produce such inequality, or a scheme, if not so devised, necessarily producing that result. Absolute equality may not be attainable, but gross and designed departures from it will necessarily bring the legislation authorizing it within the prohibition. The amendment is aimed against the perpetration of injustice, and the exercise

of arbitrary power to that end. The position that unequal taxation is not within the scope of its prohibitory clause would give to it a singular meaning. It is a matter of history that unequal and discriminating taxation levelled against special classes has been the fruitful means of oppressions, and the cause of more commotions and disturbance in society, of insurrections and revolutions, than any other cause in the world. It would, indeed, as counsel
97 in the San Mateo case ironically observed, be a charming spectacle to present to the civilized world if the amendment were to read as contended it does in law—"Nor shall any State deprive any person of his property without due process of law, except it be in the form of taxation—nor deny to any person within its jurisdiction the equal protection of the laws, except it be by taxation." No such limitation can be thus engrafted by implication upon the broad and comprehensive language used. The power of oppression by taxation without due process of law is not thus permitted; nor the power by taxation to deprive any person of the equal protection of the laws.

Soon after the adoption of the amendment Congress recognized by its legislation the application of the prohibition to unequal taxation. The original civil rights act, previously passed, made persons of the emancipated race citizens, and declared that all citizens of the United States of every race or color should have the same rights in every State and Territory to make and enforce contracts, to sue, be parties, and give evidence; to inherit, purchase, lease, sell, own, and convey real and personal property, and to the benefit of all laws and proceedings for the security of persons and property, as was enjoyed by white citizens, and should be subject to like punishments, pains, and penalties, and to none other. After the adoption of the amendment the act was re-enacted, and to the clause that all persons should enjoy the same rights as white citizens, and be subject to like punishments, pains, and penalties, it added and subject only to like "taxes, licenses, and exactions of every kind, and to no other." The Congress which re-enacted the civil rights act with this addition was largely composed of those who had voted for the amendment, and it is well known that oppressions by unequal taxation were the subject of consideration before the committee of the two Houses under whose direction the amendment was proposed.

But were this otherwise, and were the wrong of such unequal
98 taxation not prominently in the minds of the framers, it being within the language, it must be held to be within the operation of the prohibition. As truly and eloquently said by Mr. Conkling, in the argument of the San Mateo case: "If it be true that new needs have come, if it be true that wrongs have arisen or shall arise which the framers in their forebodings never saw, wrongs which shall be righted by the words they established, then all the more will those words be sanctified and consecrated to humanity and progress."

The fact to which counsel allude, that certain property is often exempted from taxation by the States, does not at all militate against this view of the operation of the Fourteenth Amendment in forbid-

ding the imposition of unequal burdens. Undoubtedly since the adoption of that amendment the power of exemption is much more restricted than formerly—but that it may be extended to property used for objects of a public nature is not questioned; that is, where the property is used for the promotion of the public well-being, and not for any private end. Thus, property used for public instruction, for schools, colleges, and universities, which are open to all applicants on similar conditions, may properly be exempted. The public benefit is the equivalent to the State for the tax which would otherwise be exacted. If buildings used as churches for public worship are also sometimes exempted it must be because, apart from religious considerations, churches are regarded as institutions established to inculcate principles of sound morality, leading citizens to a more ready obedience to the laws. Whatever the exemption, it can only be sustained for the public service or benefit received. The equality of protection which the Fourteenth Amendment declares that no State shall deny to any one is not thus invaded. That amendment requires that exactions upon property for the public shall be levied according to some common ratio to its value, so that each owner may contribute only his just proportion to the general fund. When
99 such exaction is made without reference to a common ratio it is not a tax, whatever else it may be termed; it is rather a forced contribution, amounting, in fact, to simple confiscation. As justly said by the supreme court of Kentucky, in the celebrated case of Lexington *vs.* McQuillan's Heirs, whenever the property of a citizen is taken from him by the sovereign will and appropriated without his consent to the benefit of the public, the exaction should not be considered as a tax unless similar contributions be exacted by the same public will from such members of the same community as own the same kind of property; and, although there may be a discrimination in the subjects of taxation, still persons of the same class and property of the same kind must generally be subjected alike to the same common burden. (9 Dana, Ky., 513.)

The cases of People *vs.* Weaver (100 U. S., 539), and of Evansville Bank *vs.* Britton (105 *Id.*, 322), will illustrate the character of the discrimination of which the defendants complain. By an act of Congress, passed in 1864 and re-enacted in the Revised Statutes, the shares in national banks are allowed to be included in the valuation of the personal property of the owner in the assessment of taxes imposed by authority of the State in which the banks are located, subject to two restrictions; that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State, and that the shares owned by non-residents of the State shall be taxed at the place where the bank is located. (R. S., sec. 5219.) In People *vs.* Weaver (100 U. S., 539), the meaning of these restrictions upon the State was considered by the supreme court, and it was held—

1st. That the restriction against discrimination has reference to the entire process of assessment, and includes the valuation of the shares as well as the rate of percentage charged thereon;

100 2d. That a statute of New York, which established a mode of assessment by which such shares were valued higher in proportion to their real value than other moneyed capital, was in conflict with the restriction, although no greater percentage was levied on such valuation than on other moneyed capital; and

3d. That a statute which permitted a party to deduct his just debts from the valuation of his personal property, except so much as consisted of those shares, taxed them at a greater rate than other money capital, and was therefore void as to them.

The discrimination there condemned, by which an increased value was given to the shares of the national banks beyond what was given to other moneyed capital, is a discrimination similar to that made by the elimination of mortgages in estimating the value of railroad property in the cases before us. In Evansville Bank *vs.* Britton the doctrine of this case is approved, and it was held that the taxation of shares in the national banks, under a statute of Indiana, without permitting the owner to deduct from their assessed value the amount of his *bona fide* indebtedness, as he was permitted to do in the case of other investments of moneyed capital, was a discrimination forbidden by the act of Congress.

That the proceeding by which the taxes claimed in these several actions were levied against the railroad companies on taxable interests with which they had parted was not due process of law, seems to me so obviously true as to require no further illustration. Any additional argument would rather tend to obscure a truth which should be evident upon its simple statement. And if we assume that the mortgage in each case was a mere lien or incumbrance on the property affected, and not an interest in it, as the Constitution declares it is, then, also, is it clear that its elimination as an element in the valuation of the property of the defendants for taxation, while it was considered in the valuation of the property of natural persons, was a discrimination against the former, and led to un-

101 equal taxation against them. In neither view, therefore, was the assessment valid, and the taxation levied upon it cannot be sustained.

To justify these discriminating provisions, and maintain the action in face of them, the plaintiffs have taken positions involving doctrines which sound strangely to those who have always supposed that the constitutional guaranties extend to all persons, whatever their relations, and protect from spoliation all property, by whomsoever held. These positions are substantially as follows: That persons cease to be within the protection of the Fourteenth Amendment, and as such entitled to the equal protection of the laws, when they become members of a corporation; that property, when held by persons associated together in a corporation, is subject to any disposition which the State may, at its will, see fit to make; that, in any view, the property upon which the taxes claimed were levied was classified by its use, taken out of its general character as real and personal property, and thus lawfully subjected to special taxation; and that the power of the State cannot be questioned by the Southern Pacific Railroad Company by reason of the covenant in its mort-

gage. These positions are not advanced by counsel in this language, nor with the baldness here given; but they mean exactly what is here stated, or they mean nothing, as will clearly appear when we analyze the language in which they are presented.

Private corporations—and under this head, with the exception of sole corporations, with which we are not now dealing, all corporations other than those which are public are included—private corporations consist of an association of individuals united for some lawful purpose, and permitted to use a common name in their business, and have succession of membership without dissolution. As said by Chief Justice Marshall, "The great object of an incorporation is to bestow the character and properties of individuality
102 on a collective and changing body of men." (Providence Bank *vs.* Billings, 4 Pet., 514, 562.) In this State they are formed under general laws. By complying with certain prescribed forms any five persons may thus associate themselves. In that sense corporations are creatures of the State; they could not exist independently of the law, and the law may, of course, prescribe any conditions not prohibited by the Constitution of the United States upon which they may be formed and continued. But the members do not, because of such association, lose their rights to protection, and equality of protection. They continue, notwithstanding, to possess the same right to life and liberty as before, and also to their property, except as they may have stipulated otherwise. As members of the association—of the artificial body—the intangible thing called by a name given by themselves—their interests, it is true, are undivided, and constitute only a right during the continuance of the corporation to participate in its dividends, and, on its dissolution, to a proportionate share of its assets; but it is property, nevertheless, and the courts will protect it, as they will any other property, from injury or spoliation.

Whatever affects the property of the corporation, that is, of all the members united by the common name, necessarily affects their interest. If all the members of the corporation die or withdraw from the association, the corporation is dead; it lives and can live only through its members. When they disappear the corporation disappears. Whatever confiscates or imposes burdens on its property confiscates or imposes burdens on their property; otherwise nobody would be injured by the proceeding. Whatever advances the prosperity or wealth of the corporation advances proportionately the prosperity and business of the corporators; otherwise no one would be benefited. It is impossible to conceive of a corporation suffering an injury or reaping a benefit except through its members. The legal entity, the metaphysical being that is called a corporation, cannot feel either. So, therefore,
103 whenever a provision of the Constitution or of a law guarantees to persons protection in their property or affords to them the means for its protection, or prohibits injurious legislation affecting it, the benefits of the provision or law are extended to corporations, not to the name under which different persons are united, but to the individuals composing the union. The courts will always

look through the name to see and protect those whom the name represents. Thus, inasmuch as the Constitution extended the judicial power of the United States to controversies between citizens of a State and aliens, and between citizens of different States, because its framers apprehended that State tribunals in such controversies might be swayed by local feelings, prejudices, or attachments, Chief Justice Marshal, speaking for the whole Supreme Court, held that corporations were within the provision. "Aliens, or citizens of different States," said that great judge, " are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provision, because they are allowed to sue by a corporate name. That name, indeed, cannot be an alien or a citizen, but the persons whom it represents may be the one or the other; and the controversy is, in fact and in law, between these persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted. Substantially and essentially the parties in such case, where the members of the corporation are aliens or citizens of a different State from the opposite party, come within the spirit and terms of the jurisdiction conferred by the Constitution on the national tribunals. Such has been the universal understanding on the subject." (The United States *vs.* Devaux, 5 Cranch, 61, 87.)

Similar was the construction given by that court to a clause in the treaty of peace of 1783 between the United States and Great Britain. The sixth article provided that there should be " no
104 future confiscation made nor any prosecutions commenced against any person or persons for or by reason of the part which he or they may have taken in the present war, and that no person shall on that account suffer any future loss or damage, either in his person, liberty, or property." The State of Vermont undertook to confiscate the property of an English corporation and give it away. The corporation claimed the benefit of the article, and recovered the property against the objection that the treaty applied only to natural persons, and could not embrace corporations, because they were not persons who could have taken part in the war, or be considered British subjects. Much stronger is that case than the one now before us; but the Supreme Court look with undimmed vision through the legal entity, the artificial creation of the State, and saw the living human being whom it represented, and protected them under their corporate name. (Society for the Propagation of the Gospel in Foreign Parts *vs.* Town of New Haven, 8 Wheat., 464.)

The Fifth Amendment to the Constitution declares that no person shall " be deprived of life, liberty, or property without due process of law." This is a limitation upon the Federal Government similar to that which exists in the constitution of several of the States against their own legislative bodies; and the term person thus used has always been held, either by tacit assent or express adjudication, whenever the question has arisen, to extend, so far as property is concerned, to corporations; because to protect them from spoliation is to protect the corporators also.

Now, the Fourteenth Amendment extends in this respect the same prohibition to the States that the Fifth Amendment did to the Federal Government—"Nor shall any State deprive any person of life, liberty, or property without due process of law"—and it adds to the inhibition, "nor deny to any person within its jurisdiction the equal protection of the laws." By every canon of construction known to the jurisprudence of the country, the same meaning must be
105 given to the term person in the latter provision as in the former. Surely these great constitutional provisions, which have been, not inaptly, termed a new Magna Charter, cannot be made to read, as counsel contend, "Nor shall any State deprive any person of life, liberty, or property, without due process of law, unless he be associated with others in a corporation, nor deny to any person within its jurisdiction the equal protection of the laws, unless he be a member of a corporation." How petty and narrow would provisions thus limited appear in the fundamental law of a great people!

The constitutional guaranties of due process of law and of equality before the law would be dwarfed into comparative insignificance, and almost emasculated of their protective force, if restricted in their meaning and operation as contended by counsel. A large proportion of our people are members of some corporation—religious, educational, scientific, trading, manufacturing, or commercial—and the amount of property held by them embraces the greater part of the wealth of the country. According to the report of the commissioner of railroads, made to the Secretary of the Interior, for the year ending June 30, 1882, the railroad companies operated that year 104,813 miles of railway, and transported 350 million tons of freight, of the estimated value of 12,000 million dollars. The value of these roads alone was 2,600 million dollars, and they employed that year 1,200,000 persons in operating the roads, besides 400,000 in construction—a total of 1,600,000 persons—about one thirty-third part of our population, estimated at 53,000,000.*

The value of the property of manufacturing companies is over 1,000 million dollars; of national banks, 700 millions; of insurance companies, over 600 millions; of mining companies, over 300 mil-
lions; and of telegraph companies and shipping companies,
106 each over 100 million dollars. Indeed, the aggregate wealth of all the trading, commercial, manufacturing, mining, shipping, transportation, and other companies engaged in business, or formed for religious, educational, or scientific purposes, amounts to billions upon billions of dollars, and yet all this vast property, which keeps our industries flourishing, and furnishes employment, comforts, and luxuries to all classes, and thus promotes civilization and progress, is lifted, according to the argument of counsel, out of the protection of the constitutional guaranties by reason of the incorporation of the companies; that is, because the persons composing them, amounting in the aggregate to nearly half the entire

* These figures are taken by the commissioner from the estimate of Henry V. Poor, a compiler of railroad statistics.

population of the country, have united themselves in that form under the law for the convenience of business. If the property for that reason is exempted from the protection of one constitutional guaranty, it must be from all such guaranties. If because of it the property can be subjected to unequal and arbitrary impositions, it may for the same reason be taken from its owners without due process of law, and taken by the State for public use without just compensation. If the position be sound, it follows that corporations hold all their property and the right to its use and enjoyment at the will of the State that it may be invaded, seized, and the companies despoiled at the State's pleasure. It need hardly be said that there would be little security in the possession of property held by such a tenure, and of course little incentive to its acquisition and improvement.

But in truth the State possesses no such arbitrary power over the property of corporations. When allowed to acquire and own property, they must be treated as owners, with all the rights incident to ownership. They have a constitutional right to be so treated. Whatever power the State may possess in granting or in amending their charters, it cannot withdraw their property from the guaranties of the Federal Constitution. As was said in the San
107 Mateo case: "It cannot impose the condition that they shall not resort to the courts of law for the redress of injuries or the protection of their property; that they shall make no complaint if their goods are plundered and their premises invaded; that they shall ask no indemnity if their lands be seized for public use, or be taken without due process of law; or that they shall submit without objection to unequal and oppressive burdens arbitrarily imposed upon them; that, in other words, over them and their property the State may exercise unlimited and irresponsible power. Whatever the State may do, even with the creations of its own will, it must do in subordination to the inhibitions of the Federal Constitution."

The doctrine of unlimited power of the State over corporations, their franchises, and property, simply because they are created by the State, so frequently and positively affirmed by counsel, has no foundation whatever in the law of the country. By the decision of the Supreme Court of the United States in the Dartmouth College case, it was settled, after great consideration, that the charter of a corporation under which its franchise—its capacity to do business and hold property—is conferred, is a contract between the corporators and the State, and, therefore, within the protection of the Federal Constitution prohibiting legislation impairing the obligation of contracts. So far from the State having unlimited control over the frahchises and property of corporations because of its paternity to them, it has under that decision only such as it possesses over the contracts and property of individuals. It cannot, from that fact alone, alter, lessen, or revoke their franchises, although they be a free gift. It cannot, from that fact alone, interfere with or impose any burdens upon their property, except as it can interfere with and impose burdens upon the property of individuals. Such is the doctrine not only of the Dartmouth College case,

but of an unbroken line of decisions of the Supreme Court of the United States and of the supreme courts of the several States since that case. To avoid that limitation upon
108 their power, most of the States, in charters since granted, have reserved a right to repeal, amend, or alter them, or have inserted in their constitutions clauses reserving a right to their Legislatures to repeal, alter, or amend the charters, or to repeal, alter, or amend general laws under which corporations are permitted to be formed. This reservation, in whatever form expressed, applies only to the contract of incorporation, without which it would be beyond revocation or change by the State. It removes any impediment which would otherwise exist to legislation affecting that contract. It leaves the corporation in the same position it would have occupied had the Supreme Court held in the Dartmouth College case that charters are not contracts, and that laws repealing or modifying them do not impair the obligation of contracts. It accomplishes nothing more; therefore, the legislation authorized by it must relate to the contract embodied in the charter, amending, altering, or abrogating its provisions. Legislation touching any other subject is not affected by it, neither authorized nor forbidden. Its whole scope and purpose is to enable the State to pass laws with respect to the charter, the contract of incorporation, which would otherwise be in conflict with the prohibition of the Federal Constitution. Legislation dealing with the corporation in any other particular must, therefore, depend for its validity upon the same conditions which determine the validity of like legislation affecting natural persons.

The State may, of course, accompany its grant with such conditions as it may deem proper for the management of the affairs of the corporation which do not impinge upon any provision of the Federal Constitution; and by the reservation clause it will retain control over the grant, and may withdraw it or modify it at pleasure. It is on this ground that the State has asserted a right to regulate the charges, the fares, and freights of corporations. But it is a novel doctrine that it can, on that ground, also control their prop-
109 erty, appropriate it, burden it, and despoil them of it as it may choose, unrestrained by any constitutional inhibitions. That doctrine has no standing as yet in the law of this country. The property acquired by corporations is held independently of any reserved power in their charters. By force of the reservation the State may alter, amend, or revoke what it grants; nothing more. It does not grant the tangible and visible property of the companies, their roads, their roadways, road beds, rails, or rolling-stock. These are their creation or acquisition. Over them it can exercise only such power as may be exercised through its control of the franchises of the companies, and such as may be exercised over the property of natural persons engaged in similar business.

As justly said by the supreme court of Michigan, speaking by Mr. Justice Cooley: "It cannot be necessary at this day to enter upon a discussion in denial of the right of the Government to take from either individuals or corporations any property which they may rightfully have acquired. In the most abitrary times such an act

was recognized as pure tyranny, and it has been forbidden in England ever since Magna Charta, and in this country always. It is immaterial in what way the property was lawfully acquired; whether by labor in the ordinary vocations of life, by gift, or descent, or by making profitable use of a franchise granted by the State, it is enough that it has become private property, and it is then protected by the law of the land." (Detroit *vs.* Detroit and Howell Plank Road Company, 43 Eich., 146–7.)

But it is urged that, even with an admission of these positions, property may be divided into classes and subjected to different rates; that such classification may be made from inherent differences in the nature of different parcels of property, and also from the different uses to which the same property may be applied; and it is sought to place the tax levied in these cases under one of these heads. As already mentioned, the constitution of the State
110 provides, with respect to property, that it shall be taxed in proportion to its value; it provides for no specific tax upon any article. The classification of property, either from its distinctive character or its peculiar use, must be made within the rule prescribing taxation according to value. Real and personal property differing essentially in their nature may undoubtedly be subjected to different rates; real property may be taxed at one rate, personal property at another. But in both cases the tax must bear a definite proportion to the value of the property. So, also, if use be the ground of classification, for which a different rate of taxation is prescribed, the rate must still bear a definite proportion to the value. Now, there is no difference in the rate of taxation prescribed by the law of the State for the property of railroad corporations and that prescribed for the property of individuals. There is only one rate prescribed for all property. There is, therefore, as said in the San Mateo suit, no case presented for the application of the doctrine of classification either from the peculiar character of railroad property or its use.

The ground of complaint is not that any different rate of taxation is adopted—for there is none—but that a different rule is followed in ascertaining the value of the property of railroad corporations, as a basis for taxation, from that followed in ascertaining the value of property held by natural persons. In estimating the value in one case certain elements are considered by which the value as a basis for taxation is lessened; in estimating the value in another case those elements are omitted by which the valuation is proportionately increased. All property of railroad corporations, whether used in connection with the operation of their roads or entirely distinct from any such use, is estimated without regard to any mortgages thereon, while the property of natural persons is valued with a deduction of such mortgages.

Of the property of the railroad company—the Southern
111 Pacific—several million acres of farming lands are included in the same mortgage which covers the railway, road-bed, rails, and rolling-stock of the company. No distinction is made in the assessment of the value of any of this property because of the use

of it. The whole is assessed in the same manner without regard to the mortgage thereon; and the taxes on the whole of it thus assessed, with the exception of the taxes on the roadbed, roadway, rails, and rolling-stock, have been paid by the companies, or parties to whom, since the levy, certain parcels have been sold. The discrimination between the railroad companies and individual proprietors, in the estimate of the value of their property, is made because of its ownership, and not from any specific differences in the character of the property, or in the specific uses to which it is applied.

The farming lands held by the company are not different in character from adjoining farming lands held by natural persons, yet they are assessed under the system established by the constitution of the State upon different principles. The road-bed, roadway, rails, and rolling-stock of the railroad companies are not different in their nature or use from the road-bed, roadway, rails, and rolling-stock owned in many cases by natural persons, yet they are subject to a different rule of assessment. It is not classifying property to make a distinction of that character in estimating its value as a basis for taxation. It is making the amount of taxation depend, not upon the nature of the property or its use, but upon its ownership. And if this can be done, there is no protection against unequal and oppressive taxation. As justly observed by Mr. Edmunds in the San Mateo case: "If you once concede the point that you may classify different rates upon the values of things, or may put up your values on different principles, as values by deduction or otherwise—which is the same thing stated in another way—then there is no check upon the exercise of arbitrary power. The mob or commune
112 that can get possessiou of the State Legislature for one term may despoil every one of the citizens whom it chooses to despoil, and the liberty and the security of the Constitution of the United States, secured through painful exertion and great consideration, crystallized in unmistakable language—historic, indeed, and beneficent as it is historic, securing national intrinsic rights everywhere and to everybody—will turn out to be an utter sham and delusion."

If to the position of counsel that property may be classified simply because owned by a corporation, and thus differently assessed, we add the further position that the owner of the property assessed has no constitutional right to have notice of the assessment, or to be heard respecting it, though it be double or treble the value of the property—though the property be assessed at thousands when worth only hundreds—we have a system established with a power of oppression under which no free man should ever be contented to live.

In the argument of counsel the distinction between taxes for licenses and franchises and taxation upon values seems to have been overlooked; and because no notice is required in the former case, and no opportunity given to be heard, therefore it is contended that the rule is not sound, that notice is necessary, and an opportunity of being heard in the latter case where an assessment is made upon property and values are found upon evidence, yet the distinction is plain and everywhere recognized. A license tax paid by an

insurance company of another State, in order to exercise its corporate powers in this State, is the consideration given for a privilege which the company may or may not take; if taken, the fee must be paid. Of course no notice there is necessary. If a person wishes a license to do business at a particular place, or of a particular kind, such as selling liquors, cigars, clothes, or keeping a restaurant or hotel in a city, he is only to pay what the law requires and go into the business. Notice in such cases would be of no service to
113 him, and no hearing could change the result. And the State may exact the payment of a particular sum, such as it deems proper, as a condition of the grant of corporate powers, or for their continuance, and may reserve the right to alter this condition as it may choose; or, rather, the State might have exercised such power and made such exaction had she not by her constitution declared that franchises should be assessed and taxed as property, according to their value. But for this provision no notice could be required of the amount demanded for the privilege granted, nor opportunity of being heard respecting it, for notice of hearing could be of no service to the company. Here we are not considering of the compensation to be paid for franchises or privileges of any kind, whether designated as taxes or license fees, but of taxation upon values. Where these are to be ascertained, and evidence is to be taken for that purpose, and a determination is to be made which is judicial in its character, there the owner must in some form, in some tribunal, have an opportunity afforded him to be heard respecting the proceeding under which his property may be taken before such proceeding becomes final and the valuation is irrevokably fixed. And in such cases there can be no valid deprivation of his property without it.

The notice to which we refer need not be a personal citation; it is sufficient if it be given by a law designating the time and place where parties may contest the justice of the valuation. As a general rule, only a statutory notice is given. The State may designate the kind of notice and the manner in which it shall be given. All that we assert, or have asserted, is that there must be a notice of some kind which will call the attention of the parties to the subject, and inform them when and where they will be permitted to expose any alleged wrong in the valuation of which they may complain.

It was with reference to the class of cases where values are to be found upon evidence that we said in the San Mateo suit that
114 notice and opportunity to be heard were essential to the validity of the assessment, and without which the proceeding by which the taxpayer's property was taken from him would not be due process of law. We have heard nothing in the argument of the present cases or in the criticism of the authorities which in the slightest degree affects the accuracy of the statement. In Stuart *vs.* Palmer (74 N. Y., 191) the court of appeals of New York, in an elaborate opinion, speaking by Mr. Justice Earl, said: "It is difficult to define with precision the exact meaning and scope of the phrase, 'due process of law.' Any definition which could be given would probably fail to comprehend all the cases to which it would apply. It is probably better, as recently stated by Mr. Justice Mil-

ler, of the United States Supreme Court, 'to leave the meaning to be envolved by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.' (Davidson *vs.* New Orleans, 96 U. S., 104.) It may, however, be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard and to defend, enforce, and protect his rights. A hearing or an opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this." And, again: "It has always been the general rule in this country in every system of assessment and taxation to give the person to be assessed an opportunity to be heard at some stage of the proceedings. That due process of law requires this has been quite uniformly recognized."

Numerous other authorities might be cited to the same purport, and the language of Judge Cooley, in his Treatise on Taxation, which exhibits a thoughtful consideration of the subject, and a careful examination of the adjudged cases expresses the established law. Speaking of tax cases, he says: "We should say that notice of proceedings in such cases, and an opportunity for hearing of some description, were matters of constitutional right. It has been customary to provide for them as a part of what is 'due process of law' for these cases, and it is not to be assumed that constitutional provisions carefully framed for the protection of property were intended or could be construed to sanction legislation under which officers might secretly assess one for any amount in their discretion without giving him an opportunity to contest the justice of the assessment. It has often been very pointedly and emphatically declared that it is contrary to the first principles of justice that one should be condemned unheard, and it has also been justly observed of taxing officers that 'it would be a dangerous precedent to hold that any absolute power resides in them to tax as they may choose without giving any notice to the owner. It is a power liable to great abuse,' and it might safely have been added, it is a power that under such circumstances would be certain to be abused. 'The general principles of law applicable to such tribunals oppose the exercise of any such power.'" (Cooley on Taxation, 266.)

115

The suggestion of counsel that there is a difference in the law as to notice and opportunity of being heard where an assessment is made for local purposes and where it is made under a statute providing revenue for the State is without foundation. Taxation for local improvements, or for city, county, or town purposes, involves the exercise of the same power which is exerted in taxation for State or general purposes. It is the sovereign power of the State in both cases which authorizes the tax, whether that power be exerted directly by an act of the Legislature or by a municipal body, as an instrumentality of the State. "That these assessments," says Cooley, speaking of such as are special, "are an exercise of the taxing power, has over and over again been affirmed, until the controversy may be regarded as closed." And this statement is sup-

ported in a note to his treatise by a reference to numerous adjudged cases. (P. 430.)

116 The object both of taxation for general purposes and of assessments for local purposes is to raise money. In both cases property is valued and a certain proportion of the valuation taken for the designated purpose. Whether that purpose be general or local, it in no respect changes the essential character of the proceeding. The property from which the exaction is to be made is less extensive in the one case than in the other, but in both there must be evidence of its value and a judicial determination respecting it. And the fact that in cases of local improvements there is sometimes a consideration also of the benefits to be received, takes nothing from the judicial character of the proceeding.

The clause of the Constitution which forbids deprivation of property without due process of law places liberty under the same guaranty, and no one can be deprived of either—property or liberty—under the name of taxation, any more than under any other name, by officers of the State, without some notice of their proceedings, and a right to be heard respecting their determination before it is executed.

The covenant in the mortgage of the Southern Pacific Railroad Company cannot affect one way or the other the right of the plaintiff to recover against that company. The power of the State is not enlarged nor diminished by it. It is not made with the State and could not be enforced by it. So far as the power or action of the State is concerned, it cannot possibly have any influence. It is a matter which concerns only the parties. They can by arrangement vary it any day; they may enlarge it, qualify it, or release it whenever they choose. It would be strange, indeed, if the State's power of taxation depended in any way upon the stipulation of third parties, or the validity of a tax could be affected by it. The covenant reads as follows: "And the said party of the first part hereby agrees and covenants to and with the said parties of the second part,

117 and their successors in said trust, that it will pay all ordinary and extraordinary taxes, assessments, and other public burdens and charges which shall or may be imposed upon the property herein described and hereby mortgaged, and every part thereof." Then follows a provision that the mortgagees or any bondholder may, in case of default by the mortgagor, pay and discharge the taxes and any lien or incumbrance upon the property prior to the mortgage, and that for such payments the party making them shall be allowed interest, and be secured by the mortgage.

The covenant is necessarily limited to such taxes as may be lawfully levied on the mortgaged property, such as the mortgagor is personally bound to the State to pay, and to such other liens as may arise from his previous contract with respect to the property. The mortgagor could not be required to pay any other taxes or discharge any other liens, and should the mortgagees pay or discharge any other they could neither hold the mortgage as security for the amount, nor the mortgagor liable. The covenant cannot be construed to extend to any taxes levied in disregard of the Constitution or laws,

nor to such liens as may arise from a tax on other than the mortgaged property, nor from any act of the mortgagees, nor any judgment against them. Should a judgment, for instance, against them become a lien upon all their interests in real property, and, among others, on that conferred by the mortgage, it would not be embraced by the covenant. That does not cover taxes levied or leviable on the mortgage, nor on the bonds secured; they are not within its terms, and the State cannot enlarge its meaning.

At the time the mortgage was given, there had been conflicting decisions of the supreme court of the State as to the liability of mortgages to taxation. It must be supposed that the parties were well acquainted with these rulings, and, though the last decision then rendered was against their taxation, it was the subject of popular comment and discontent, and, counsel inform us, was one of
118 the most potent causes which led to the calling of a convention to change the constitution. If the parties, therefore, had intended to enter into a covenant that should bind the mortgagor to pay any taxes which might thereafter be levied on the mortgage, it would have been the natural and easy way to say so. Not having said so, we cannot impute to the language used anything beyond its plain meaning—and that is, that the mortgagor would pay such taxes and discharge such liens on the property as should be legally chargeable to him; not such as the law might afterwards impose upon the mortgagees. In fact, the covenant creates no greater liability on the part of the mortgagor than would have existed without it; and it was inserted only out of abundant caution. Every mortagor is bound to pay the taxes lawfully levied on the property mortgaged, and to discharge any liens created by his previous act; and if at any time the mortgagee is compelled to pay the taxes and discharge such liens to preserve the security, he can collect the amount from the mortgagor. So the question comes back to the original point in the case—were the taxes for which the present action was brought lawfully levied? If so, they can be enforced, whatever may be the private relations or stipulations between the parties to the security. If not lawfully levied, if the law or State constitution, under which they were imposed, is in conflict with the inhibitions of the Federal Constitution, if the taxes were laid upon interests with which the mortgagor had parted, they cannot be enforced, whatever may be the pledges of the parties to each other. The argument of the plaintiff amounts to this: If the taxes had been lawfully levied on the mortgage, the mortgagor would have been obliged to pay them under its covenant; therefore it is not injured by the illegality of the levy, and, not being injured by it, should not be heard to complain of it, but be compelled to pay the taxes. The answer to this specious reasoning is obvious. If the taxes are not
119 lawfully levied, there are none for the payment of which the covenant can be invoked, even by the mortgagees. The plaintiff must show that there rests upon the mortgagor a legal obligation to the State to pay the taxes, arising upon its constitution or laws, not from any stipulation the parties may have made with each other, with which the State has no concern. The action is not to

enforce a lien upon the property; it is for a personal demand, and a personal liability to the State must be shown. No other liability of any kind to any party can aid a recovery.

The covenant we have been considering is not contained in the mortgage on the lands of the Central Pacific Company; and for such lands in California, amounting to upwards of six hundred and fifty thousand acres, that company is assessed and taxed without and deduction of the mortgage from their value, just as the Southern Pacific Company is taxed for its lands. The amount due on the land mortgage is over five and a half million dollars.

I have thus gone over, so far as I deem it necessary or important, the several positions of counsel for the plaintiffs, and in none of them do I find any sufficient answer to the objection of the defendants. This opinion might, therefore, close with a simple order directing judgment for the defendants. But owing to misapprehensions that have largely prevailed in the community since the trial of the San Mateo case, which involved similar questions, as to the effect of a decision against the State upon its right to subject railroad property to its just proportion of the public burdens, I will venture to make some suggestions as to the manner in which all such demands of the State may be enforced without infringing any principle of constitutional law. I am profoundly sensible of the irritation which a supposed desire to escape from the just burdens of Government naturally creates. The more powerful, the more wealthy the party, the more intense the feeling; and it finds expression in words of bitter complaint, not merely against the party, but sometimes
120 also against any administration of justice which tolerates such supposed evasion. It is sometimes forgotten that the courts cannot supply the defects of the law, nor always correct the mistakes of public officers, nor the errors even of learned counsel. Certainly no member of this court would countenance the escape of anybody from his just obligations; but it cannot, with any seeming justice, declare that one party shall discharge an obligation which the law, properly administered, would impose upon another. Its duty is to administer the law as it finds it, not to make it, never forgetting that its administration must always be in subordination to those great principles for the protection of private rights which are embodied in our National Constitution, and which are of priceless value to every one in the State.

The railroad companies in California are taxed yearly to an amount exceeding $600,000. Their property is heavily encumbered with mortgages, amounting to much more than its actual value. Why should they not be allowed by law, if they pay this sum, a credit for it on their mortgages, as any natural person paying it would be allowed? Why should this unjust discrimination be made against them? Why should they by law be denied a credit for this more than $600,000 a year? Is there any justice in this denial? There is no difficulty in assessing and taxing the mortgages, if the words "except as to railroads and other *quasi*-public corporations" be eliminated from the constitution as invalid. The imaginary difficulty has arisen from the supposed necessity of taxing the debts,

which the bonds secured. As these are held in different parts of the country, some out of the State, it would be impossible, it is said, to reach them. But the answer is that the taxes should be placed upon the mortgages, which, for purposes of assessment and taxation, are to be treated as interests in the property mortgaged, as much so as if it had been unconditionally conveyed to the mortgagees.

121 The records of the different counties show the mortgages. The assessors can return to the Board of Equalization the value of the property covered by the mortgages in their respective counties under section 3678 of the Political Code. The board would then have the value of the property of the companies and the amount of the mortgages before them. The mortgage of the Southern Pacific Company being greater than the value of the entire mortgaged property, it would be assessed at such value. It could never, as a mortgage, be worth more than the property. If necessary or convenient, the assessment of the mortgage on the roadway, roadbed, rails, and rolling-stock could be stated separately from the value of the mortgage on other property of the company, and apportioned to the different counties as at present. The value of the mortgage on other property could also be apportioned as required by the Political Code. Why, then, should not this system be pursued? The State would thus collect all the taxes which it ought to collect. The tax, being a lien upon the property, could be enforced by a sale of the property, just as though it was levied on the property, and not upon the mortgages. If the companies should then pay the tax, they could by the law claim credit for it on their mortgages; and it would be deducted in the payment of the interest or principal of their bonds. Then justice would be done to the corporations as it is done to individuals. The same proceeding could be pursued with the mortgage on the property of the Central Pacific Company. That also being greater than the value of the property, the State would be able to collect as large a revenue as by taxation on the property itself, and the company would have the benefit of the payment by a credit on its mortgage.

It follows, from the views expressed, that findings must be had for the defendants, and judgment in their favor entered thereon.

122 Concurring opinion.

SAWYER, circuit judge:

The discussion in this opinion, though applicable to all the cases tried, will have special reference to the facts in the case of Santa Clara County *vs.* The Southern Pacific Railroad Company. This case is similar in its main features to that of San Mateo *vs.* Southern Pacific Railroad Company, decided by this court last year. (8 Sawyer, 281.)

The questions involved require for their solution a construction of two clauses in the first section of the Fourteenth Amendment to the Constitution of the United States, which declare that no State shall "deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the

equal protection of the laws." Does the requirement of due process of law extend to the taking of property by taxation, and does equality of protection by the laws secure a person, whatever his association with others in business, from the imposition of greater burdens by taxation than such as are equally imposed upon others under like circumstances? Or, are persons excepted from the protection of these provisions when their property is taken for the support of government, or when they are associated with others in a corporation for the more convenient transaction of their business?

First. As to the meaning of the phrase, "due process of law," in the amendment, I used this language in the San
123 Mateo case: "No one, I apprehend, would for a moment contend that a man's life, or his liberty, could be legally taken away without notice of the proceeding, or without being offered an opportunity to be heard, or that a proceeding whereby his life or liberty should be forfeited, or permanently affected, without notice or opportunity to be heard in his own defence, could, by any possibility, be by 'due process of law.' In such cases there could be no just conception of 'due process of law' that would not embrace these elements of notice and opportunity to be heard. Any conception excluding these elements would be abhorrent to all our ideas of either law or justice. If these elements must enter into and constitute an essential part of due process of law in respect to life and liberty, they must also constitute essential ingredients in due process of law where property is to be taken, for the guaranty in the Constitution is found in the same provision, in the same connection, and in the identical language applicable to all. One meaning, therefore, cannot be attributed to the phrase with respect to property and another with respect to life and liberty." (*Ib.*, 288.)

And it was argued that the same construction must be given to the same language when used in the same relation with reference to property which is given to it when used with reference to life and liberty, and, therefore, that due process of law, whereby a party is to be deprived of his property, as one element or ingredient, must include an opportunity to be heard. This principle was conceived to be established by an unbroken line of authorities. On the trial of this case counsel have vehemently assailed this doctrine, accompanied with a confident assertion that it has not the sanction of any authority, and that the only authority upon the point is against it, and was not referred to by the court or by counsel in the San Mateo case. It may be well, therefore, to give some further consideration to the position asserted.

No counsel has yet appeared who has endeavored to main-
124 tain the proposition that, if a man's life is taken, or he is permanently deprived of his liberty by some secret tribunal or body of men, without having notice or an opportunity to be heard in his own defence, he has had the benefit of "due process of law." If there is anything that was settled under the principles of the common and the constitutional law of England, before the severance of the Colonies from the mother country and the establishment of our National Constitution, it is that no man can

be deprived of his life or his liberty without being afforded an opportunity to be heard in his own defence. The law of the land—due process of law—vouchsafes to him this right or privilege. A man deprived of life without having an opportunity to be heard is simply assassinated or murdered; and the man permanently immured in a dungeon for an imputed offence, upon the order of any man or body of men, without an opportunity to be heard against the charge made, is arbitrarily and despotically deprived of his liberty without authority of law—without "due process of law," and in direct violation of "the law of the land." So, also, I have understood it to be equally well established, as a part of the common and constitutional law of England, as a general rule, that no man's property can be lawfully taken from him against his will without an opportunity of being heard.

The rights of life, liberty, and property are all fundamental, personal rights of the same grade of character. They are treated as such in the amendment to the Constitution in question and placed upon precisely the same legal footing in the same sentence—the identical words, without even a repetition, covering them: nor "shall deprive any person of life, liberty, or property without due process of law." No one has attempted to maintain the proposition that a person can be lawfully deprived of his life or liberty without an opportunity to be heard; nor has any one, so far as I am aware, endeavored to show that "due process of law," as a general rule, respecting notice, and an opportunity to be heard, means one thing with reference to depriving one of life and liberty, and something else with reference to depriving him of property. Counsel only seek to maintain that "due process of law" does not, universally, require an opportunity to be heard, as a condition of lawfully depriving one of his property, without considering the other branch of the proposition. It devolves upon those who maintain that there is a difference in the signification of this clause, as a general rule, when applied to life and liferty and when applied to property, to clearly establish it; and if there is an exception to the universality of the rule to point it out and show that the case under consideration is within the exception.

In combating the principal stated it is insisted that the language used by the court is too broad; that there are cases—peculiar cases—as shown by the authority cited, to which it is inapplicable. If this were so, it would only appear that there may be exceptions to the general rule, depending upon special circumstances and long-established usage. It would then be necessary to show that the case in hand is within some recognized exception, and this has not been done.

In the San Mateo case we disclaimed any attempt to give an accurate definition of the term "due process of law," which should be "applicable to all cases," as it was not deemed "necessary for the determination of that case." This disclaimer left room for exceptions founded upon long-recognized and well-established usage. We there said that "to take one's property by taxation is to deprive one of his property; and if not taken in pursuance of the law of the

land, in some due and recognized course of proceedings based upon well-recognized principles in force before and at the time this clause was first introduced into the various constitutions and the legislation of the country, is to take it without due process of law." The doctrine was recognized that those forms and courses of proceeding based upon well-recognized principles in force before
126 and at the time of the adoption of our National Constitution would be "due process of law." The case of Murray's Lessee *et al. vs.* Hoboken Land and Improvement Company (18 How., 274), is a case of the kind—an exception to the ordinary rule of law depending upon the peculiar character, conditions, and circumstances of the case.

The mode of proceeding in this particular class of cases had the sanction of long-established usage in England before and down to the settlement of our country; and Mr. Justice Curtis' whole opinion is a labored effort to show that the case he was discussing was an exception to the ordinary rule of law, dependent alone upon long-established and exceptional usage. The case was that of a defaulting public officer, who had collected a large amount of public revenue of the United States and appropriated it to his own use. The act of Congress provided a summary mode of proceeding to collect the money from him. It provided, among other things, for an auditing of the defaulting official's accounts, and certifying the amount due by the proper officers of the Treasury (the accounts are made up from the returns of the officer himself, and are matters of record in the Treasury Department); that when so audited and certified it should become a lien on the property of the defaulting officer, which should be enforced by seizure and sale under a distress warrant issued by the solicitors of the Treasury. The Constitution having invested the judicial power in the courts, and declared that the judicial power shall extend to controversies to which the United States are a party, the questions were, whether these acts, under the statute of 1820, were an exercise of judicial power, vested solely in the courts; and if not an exercise of judicial power, whether such a seizure under the warrant, without the action of the judicial power, did not deprive the party of his property "without due process of law," in violation of the provisions of the Constitution on that point.
127 Or, as stated by Mr. Justice Curtis himself, the questions were, whether "a collector of customs, from whom a balance of account has been found to be due by accounting officers of the Treasury designated for that purpose by law, can be deprived of his liberty or property in order to enforce payment of that balance without the exercise of the judicial power of the United States, and yet be 'due process of law' within the meaning of those terms in the Constitution; and, if so, then, secondly, whether the warrant in question was such due process of law?" He discusses the question as to what is meant by "due process of law," and concludes that a distress warrant, so far as the warrant itself is concerned, is due process of law, provided there was no judicial action necessary as a basis for it; for Congress can prescribe any kind of process, so far as the form and mode of issue is concerned. He then discusses the question as to

whether the action of the Treasury Department, in auditing and certifying the account, constituted a sufficient basis for the warrant to make the proceeding due process of law. There being nothing in the Constitution to expressly authorize the proceeding, he "looked to the usages and modes of proceedings existing in the common and statute laws of England before the emigration of our ancestors from England, and which are not shown to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." He found in regard to debtors of the King—defaulting receivers of the revenue in particular—that a summary remedy existed, and a writ of extent might be levied upon their goods and lands; but "to authorize a writ of extent, however, the debt must be matter of record in the King's Exchequer." Thus the debt was already ascertained by matter of record.

"In regard to debts due upon simple contracts other than those due from collectors of the revenue and other accountants of the Crown, the practice from very ancient times has been to
128 issue a commission to inquire as to the nature of the debt"—a proceeding of a strictly judicial nature, and, therefore, due process of law. These proceedings were had under various acts of Parliament—that omnipotent legislative body which could repeal Magna Charta itself.

Justice Curtis proceeds: "This brief sketch of the modes of proceeding to ascertain and enforce payment of balances due from receivers of the revenue in England is sufficient to show that the methods of ascertaining the existence and amount of such debts, and compelling their payment, have varied widely from the usual course of the common law on other subjects; and that as respects such debts, due from such officers, the law of the land authorized the employment of auditors, and an inquisition without notice, and a species of execution, bearing a very close resemblance to what is termed a warrant of distress in the act of 1820, now in question." "It is certain that this diversity in the law of the land between public defaulters and ordinary debtors was understood in this country and entered into the legislation of the Colonies and Provinces, and more especially of the States, after the Declaration of Independence, and before the formation of the Constitution of the United States."

As thus seen, this mode of enforcing the payment of balances was limited to defaulting collectors and "receivers of the public revenues of England, and where the debts were of record in the King's Exchequer." And it shows that the methods of ascertaining the existence and amount of such debts and compelling their payment have varied widely from the usual course of the common law on other subjects; "and as respects such debts due from such officers 'the law of the land' authorized" a summary process similar to that of the law of 1820; and "this diversity in the 'law of the land' between public defaulters and ordinary debtors was understood in this country." Thus, this mode of proceeding was an exception to the general rule as to what is "the law of the land," or "due
129 process of law," made in favor of the King against those who accepted office from him, under and subject to laws burdened

at the time with peculiar and stringent remedies, and then violated their duties and trusts by appropriating the public revenues collected, instead of putting them into the treasury; and whose indebtedness was "matter of record in the King's Exchequer." This exception is recognized by the court, but as an exception, and the decision is put upon the ground that it is an exception, and not the rule. "For," says Mr. Justice Curtis, "though 'due process of law' generally implies actor, *reus judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings (2 Inst., 47, 50; Hoke *vs.* Henderson, 4 Dev., N. C., 15; Taylor *vs.* Porter, 4 Hill, 146; Van Zant *vs.* Waddell, 2 Yerg., 260; State Bank *vs.* Cooper, *Id.*, 599; Jones' Heirs *vs.* Perry, 10 *Id.*, 59; Green *vs.* Briggs, 1 Curtis, 311), yet this is not universally true." An exception, then, is found in cases against defaulting public officers whose debts are of record. And such was the case of Murray's Lessee *vs.* Hoboken Land and Improvement Company.

The court, in speaking of duties levied, and of defaulting officers, further says: "What officers should be appointed to collect the revenue thus authorized to be raised, and to disburse it in payment of the debts of the United States; what duties should be required of them; when and how and to whom they should account, and what security they should furnish, and to what remedies they should be subjected to enforce the proper discharge of their duties, Congress was to determine. In the exercise of their powers they have required collectors of customs to be appointed; made it incumbent on them to account, from time to time, with certain officers of the Treasury Department, and to furnish sureties by bond for the payment of all balances of the public money which may become due from them. And by the act of 1820, now in question, they have undertaken to provide summary means to compel these officers—and in case of their default, their sureties—to pay such balances of the public money as may be in their hands."

130 Whatever may have been the grounds of the distinction originally made between defaulters of the public revenue and other citizens, the case of such defaulting officers is clearly shown to be an exception to the general rule, resting upon very special circumstances, and the case cited and relied on is a striking illustration of the maxim that "the exception proves the rule."

But, again, under the statute of 1820 (3 Stat. U. S., 595), by the provisons of section 4, the party did in fact have an opportunity to be heard before he could be deprived of his property. That section provided "that if any person should consider himself aggrieved by any warrant issued under this act, he may prefer a bill of complaint to any district judge of the United States, setting forth the nature and extent of the injury of which he complains," and have a hearing. It is true that there was a determination of his liability, and process issued, which would become final and conclusive if he did not ask for a hearing, and Mr. Justice Curtis observes upon this section: "The act of 1820 makes such a provision for reviewing the decision of the accounting officers of the Treasury. But until it is reviewed it is final and binding." So in all cases of taxes under

the constitution of California, except where the assessment is by the State Board of Equalization, the assessment is first made by the assessor, and the taxpayer may afterwards, on a proper petition, have the action of the assessor reviewed by the Board of Equalization, and thus have an opportunity to be heard before his property is finally appropriated; yet, if he does not apply for such review, the tax levy becomes final and conclusive, and will be collected in the ordinary way by seizure and sale, or such other means as may be provided.

Both the ordinary taxpayer under the laws of California and the defaulting officers under the act of 1820, therefore, have an opportunity to be heard before their property can be finally appro-
131 priated, in a similar sense, and at a corresponding stage of the proceeding. If the opportunity thus afforded the taxpayer is in accordance with due process of law within the general rule, it is not apparent why the opportunity afforded the defaulting officer by the act of 1820 is not also. They both stand upon the same footing as to the time when an opportunity to be heard is given, the first determination before a hearing being only provisional, the accounting and seizure under the act of 1820 being something in the nature of an attachment to secure a lien, with an opportunity to be afterwards heard if the amount claimed by the Government, is not, in fact, due.

In our judgment, this case in no sense or particular conflicts with the point decided by us as to the general rule—and the rule applicable to that case—in the San Mateo County Case; on the contrary, we think it a strong case to support the rule. It was cited by counsel and considered by us in the San Mateo Case, but we did not think it militated against our decision, and we did not deem it necessary to extend the discussion by noticing it in the opinions delivered. But after carefully reviewing the case, in consequence of its being so confidently relied on, and the only one relied on as being inconsistent with our decision on this point, we think it may well be cited by us as a strong authority in support of our judgment. These tax cases certainly are not within the exception recognized in that case. The case is the only authority cited—unless the Illinois Railroad Tax Cases (92 U. S., 575) were so regarded by counsel—claimed to be in conflict with our decision on this point, and the Hoboken Land Case cited had no relation at all to what is necessary to constitute a valid levy of a public tax. No authority was cited to show that a tax levy upon property to be assessed upon evidence of its value is one of the exceptions to the general rule that an opportunity to be heard before property can be taken from its owner and appropriated to public use is an essential element of "due process of law."

132 In the Illinois railroad tax cases, referred to by counsel, the points discussed and relied on were that the act under which the tax was levied and equalized was void, as being in contravention of the constitution of Illinois, and that the bills in chancery filed presented no case for an injunction, for the reason that there had been no payment or tender of so much of the tax as was conceded ought to be paid. The court rested its decision mainly

upon the latter ground, but also held that as the supreme court of Illinois had decided the act not to be in contravention of the State constitution, that decision would control the action of the courts of the United States. The court, however, expressed its concurrence with the views of the State supreme court on that point. In the course of the opinion delivered it was said that the State Board of Equalization of Illinois, in equalizing the taxes of the several counties, the equalization being by classes and counties, need give no notice to individual taxpayers, other than such as the law afforded; but, as I understand the decision, this was said with reference to the point whether the statute was valid under the State constitution. There does not appear to have been any point argued or relied on as to what constitutes "due process of law;" and the court, in its decision, does not decide, discuss, or even allude to the question as to what are the necessary elements of "due procees of law," with reference to taxation, or otherwise, within the meaning of the Fourteenth Amendment to the National Constitution. That question was, evidently, not considered. We, therefore, do not regard the observations made in the course of the opinion upon statutory notice in its relation to the equalization of taxes, on the question of the validity of the statute under the State constitution or other casual remarks upon points not argued or well considered, as authoritative upon the point now under consideration.

This case, as was the San Mateo case, has been laboriously
133 prepared and elaborately argued by many eminent counsel, and if the industry of the attorney general and of a large number of attorneys and special counsel for the numerous counties interested has failed to find any recognition of the principle they were endeavoring to maintain, either in the practice of the several States, in the text-books, or decisions, or even *dicta* of the courts, we think it will be safe to presume that none can be found. The assertion of counsel, which is extraordinary for the positiveness with which it is made, that the court "finds no warrant whatever in the books" for the views expressed in the San Mateo case, that an opportunity to be heard, before property can be compulsorily taken from a person in the form of a general tax upon property, is an essential element in "due process of law," may be attributed to the zeal of the advocate. It is not founded upon any pretense that the language quoted from the various cases cited is not found in the decisions, but on the ground that in some of the cases the decision did not turn upon the precise point whether such an opportunity is an essential element of "due process of law," and that in other cases the question arose in relation to local assessments for street improvements and the like, and not on assessments for taxes for general revenue under laws providing for the ordinary general expenses of the State, county, or city.

As to the first class of cases, one of the counsel of the defendants well says, and his language is adopted as a clear general statement of a principle often acted upon by the courts: "The existence of doctrines and rules of law is often shown and established by a continuous and uniform series of judicial *dicta*, incorporated into their

opinions by judges *arguendo*, although, perhaps, the actual facts of the cases under discussion did not absolutely require the statement of such doctrines or rules. And here you will discriminate. * * * These expressions of judicial opinion may be correct, or may not be correct. They may be expressions of well-settled rules, of
134 well-settled and established principles—principles the statement of which is not absolutely necessary to the final decision, and yet a continuous and uniform series of such judicial statement is often very high; in fact the highest evidence of the existence of the rule of law which they do set out. One simple *dictum* may not be of much weight, or it might have much weight, depending largely upon the ability, the character, and authority of the judge. But a uniform *concensus* of such judicial expressions of opinion, even when they are *dicta* of different judges in various courts, especially when they have been accepted by able text-writers, and not contradicted by a single direct decision, is as high evidence of a doctrine or rule as can be found."

In all the cases of this class cited by the court, even if the decision did not turn upon this point of constitutional law, the discussion was cognate to it, and the judges clearly and distinctly stated the right to an opportunity to be heard as a constitutional right. Some of these declarations can scarcely be called *dicta*, and they relate both to general taxation and local assessments. While such assertions of the principle of law may not be of so controlling a character as a decision of a court of acknowledged authority, directly determining the point in issue, upon mature consideration they are certainly of some authority as being the deliberately expressed opinions of eminent judges, and entitled to great weight. So, also, so distinguished a jurist and text-writer as Chief Justice Cooley gives it as his deliberate opinion, as well as states it as a rule drawn from the authorities cited by him, that notice of the proceedings and opportunity to be heard are essential. His language is: "We should say that notice of proceedings in such cases and an opportunity for a hearing of some description were matters of constitutional right. It has been customary to provide for them as a part of what is 'due process of law' for these cases, and it is not to be assumed that constitutional provisions, carefully framed for the protection of property, were intended or could be construed to
135 sanction legislation under which officers might secretly assess one for any amount in their discretion, without giving him an opportunity to contest the justice of the assessment. It has often been pointedly and emphatically declared that it is contrary to the first principles of justice that one should be condemned unheard; and it has also been justly observed of taxing officers that 'it would be a dangerous precedent to hold that any absolute power resides in them to tax, as they may choose, without giving any notice to the owner. It is a power liable to great abuse,' and it might safely have been added, it is a power that under such circumstances would be certain to be abused." "The general principles of law applicable to such tribunals oppose the exercise of any such power."

In the other class of cases arising out of local assessments the

point was directly in issue, and the point in the case upon which the decision turned, and in no case was there any distinction drawn between taxation for special local purposes and general taxation. There can be no difference. In either case, whether general taxation or local assessment for special purposes, the tax or assessment is levied and collected under and by virtue of the sovereign power of taxation. There is no difference in the power or principle exercised. The only difference recognized is the difference in the mode of ascertaining the proper amount to be paid by each. Both are assessed and collected for a public purpose, as the party's share of the public burden, but the local assessment is distributed over a smaller number of persons and a more limited territory, and is usually assessed upon that part of the property supposed to be especially benefited. It is not always, and perhaps not usually, assessed according to the value of the property, but according to benefits, or according to the square foot or front foot or number of acres, or on some such principle or of apportionment. It is as necessary to apportion it according to some fixed, uniform rule, requiring action of a judicial nature, as in the case of general taxa-
136 tion. This rule is the only distinction recognized, both systems of assessment and collection resting ultimately upon the sovereign power of taxation. Emory *vs.* The City of San Francisco, 28 Cal., 349, and People *vs.* Mayor of Brooklyn, 4 Com., 420, well illustrate the only distinction between general taxation and local assessments, and none affect the point under discussion. In both it is necessary to ascertain the amount, extent, and character of the property which forms the basis of the public charge, and on account of which it is to be collected, in order to properly apportion to each owner his proper share of the public burden. There is as great necessity for him to have an opportunity to be heard before the tax, in the case of general taxation, becomes final, as there is in the case of an assessment for local purposes, as street improvements. The levying and collection of taxes for general purposes, under laws providing for general taxation, are just as clearly a depriving of the owner of his property as the levy and collection of a street or other assessment for local purposes. It is impossible to distinguish them on this point, and no distinction is made in the books. A decision of the point, as to notice and opportunity to be heard in a case of a street assessment, is just as clearly an authority directly in point on the question at issue as though made in a case of general taxation, and it would be equally controlling. The authorities arising upon the assessment cited, therefore, are, in our judgment, authorities directly and fully in point.

Again, so far as we are advised, and such is the statement in the books, which has not been controverted, it has been the usual practice in the legislation of all the States, at some point in the proceedings, to levy and collect a tax based upon property, where it is necessary to ascertain the amount, character, and value before the liability becomes finally and irrevocably fixed, to give to the owner or taxpayer an opportunity to be heard. Such has always been, and
137 is now, the case under the constitution of California, except as

to railroads operated in more than one county; and where there has been a departure from the rule, and the validity of such statutes litigated, on the ground of want of due process of law, as we have seen, the statutes have been overthrown. The fact of such general practice in legislation is very persuasive evidence that, in the estimation of the legislators and people of the several States, an opportunity to be heard in such cases is an important element in "due process of law." This is, of itself, authority entitled to serious consideration. As the case stands, then, no decision of any court; no *dictum* of any respectable judge, other than so far as the cases cited may be so regarded; no passage from any text-writer has been brought to our notice which is in direct conflict with the law and principles as stated in the citations made by us on this point in the San Mateo case.

In view of the numerous *dicta*, conceding them to be, properly, *dicta*, of able judges in one class of cases cited; of the able decisions, directly in point, in the other class, arising under local assessment laws; of the assumption of the existence of the rule by the United States Supreme Court in Davidson *vs.* New Orleans; of the adoption and laying down of the rule by text-writers of the highest eminence and judicially recognized authority; in view of the general legislation of the States upon the subject, from the beginning recognizing, and, practically, acting upon the principle, and in view of the further fact that no decision of a judge, or statement of the rule by text-writers to the contrary, has been brought to our notice, we think that the court was fully justified, in the San Mateo case, in expressing the belief that the authorities established beyond all controversy that somewhere in the proceeding of assessing a tax upon property, where it is necessary to ascertain its amount, character, and value, as a means of apportionment under a law or State constitution, at some point before the amount of the assessment becomes finally
138 and irrevocably fixed, the statute or State constitution must provide for notice to be given to the owner of the property taxed, and an opportunity be afforded to make objections and be heard upon them. If this defendant, on its large amount of property, can be lawfully taxed unheard, then it is competent for the State to abolish all right to be heard, and every person can be taxed unheard at the arbitrary will of the taxing officers.

We have never contended that some species of taxes, as a poll tax, license tax upon occupations, trades, etc., where the tax is specific, and not ad valorem, and does not depend upon the amount of the business done and the like, may not be levied without an opportunity to be heard. Taxes of these and like kinds operate upon all alike, and a hearing would be of no possible avail. The law itself fixes the amount. It is a legislative act wherein the objects of taxation are indicated and amount fixed alike for all, leaving nothing of a judicial nature to inquire into or determine. But, where the tax is based upon the amount, character, condition, and value of property, the amount of business, income, etc., and it is necessary to inquire into, examine, hear evidence, and decide upon these matters in order to assign to each individual his proper share of the public burden, he

is entitled to notice of some kind and an opportunity to be heard before the extent of his liability is finally and irrevocably fixed. The notice may not be required to be personal to each individual or anything other than statutory, but the statute should fix some time within and place at which he may appear, and must give to the taxpayer a right and some opportunity to appear and be heard upon the matter. He may not succeed in reducing his tax, but the law affording an opportunity presumes that justice will be done upon proper hearing and proofs by the officers charged with the duty of doing justice in these matters. To the suggestion that a party is as much entitled to be heard upon the fixing of the rate of taxation as to ascertaining the kind, amount, and value of the property,
139 it is sufficient to observe that fixing the rate is a matter of legislative discretion and a legislative act. An estimate of the amount of revenue required, the probable total amount of property upon which it must be imposed being made, the rate is fixed by the Legislature upon that basis, making the allowance, suggested by experience, for inability to collect the whole tax. When fixed it operates equally upon all. It is only when it is necessary to ascertain the kind, amount, condition, and value of each man's property, for the purpose of apportioning his proper share of the burden, that it is necessary to act judicially and to give an opportunity to be heard before the amount shall be finally and irrevocably fixed.

Second. We are of the opinion, expressed in the San Mateo case, that the statement required by section 3664 of the Political Code, as adopted in 1880, does not afford notice and an opportunity to be heard sufficient to constitute "due process of law," within the meaning of the constitutional provision, for the reasons there stated. (8 Sawyer, 296.) In this case the assessment was largely in excess of the valuation furnished by the railroad officials in pursuance of section 3664. As to the supposed statutes of 1881, an error in the printed journal appears, which was not called to our attention at the hearing of the San Mateo case. Upon counting the names of those appearing among the ayes in the printed journal (Jour. Ass., 24th session, page 472) there are found to be forty-one names, which constitute just a majority, although they are footed up as thirty-nine, and the announcement by the speaker was that there were thirty-nine ayes and thirty-two noes. The speaker declared "that this was not the final action of the bill, and that the house had concurred in senate amendments to Assembly bill No. 475, by a vote of thirty-nine ayes to thirty-two noes." (*Id.*, 473.) Mr. Paulk appealed from the decision of the chair, "on the ground that forty-one votes were required for concurrence." On motion of Mr. Hoitt, this appeal
140 was laid on the table. Mr. Hale filed a protest, the ground being "that on vote taken on the motion to concur in the said Senate amendments, and the only action taken by this Assembly on said bill, as amended in the Senate, whereby it was passed by the Assembly, there was less than a majority of the members of the Assembly voting therefor; and, therefore, said bill having upon such final vote received less than a constitutional majority of the Assembly, I protest, as aforesaid, that said bill should have been

declared lost." (*Id.*, 475.) The Speaker then again "stated that the action on senate amendments to the bill was not a final action on the bill, and, consequently, concurrence or non-concurrence in the amendments required a majority vote only." (*Id.*, 475.) Mr. Griffith thereupon said: "The decision of the speaker and the house, to the effect that less than a majority of the whole can concur in an amendment which may take all the virtue out of a bill, I regard as dangerous. * * * Wherefore I desire to enter my solemn protest against such proceedings." (*Id.*, 475.) And Mr. Kellogg said: "I desire to have my protest entered upon the journal of this Assembly against the decision of the speaker, in declaring that the Assembly had concurred in the senate amendments to the bill, * * * for the reason that the journal shows that forty-one members did not vote aye in concurring with said amendments."

This was the last action of the house on this bill. It will be seen, then, that, while upon counting up the ayes in the printed journal forty-one names are found, yet that they were footed up and carried out as thirty-nine; the vote was announced by the speaker as thirty-nine, and the whole subsequent action of the house was upon the assumption that there were but thirty-nine. Upon comparing the printed journal with the original written journal, however, on file in the office of the secretary of State, it is conceded on all sides that they do not agree in the names voting aye, the original written journal, containing only forty names, one of the names in the
141 printed journal not appearing in the written journal. We are of opinion that the written journal is the authentic official record, and that it corresponds with, and is sustained by, all the other parts of the printed journal, and with the announcement of the speaker, and all the action of the house, and that it must control. It, therefore, affirmatively appears that the act never passed, and never became a law of the State of California.

Besides, it was officially announced by the speaker at the time, and so recorded, that this was not the final passage of the bill, and that it was on this ground that the amendments were concurred in by a vote less than the number required by the constitution on the final passage of a bill. There was no appeal from this decision, and it does not appear to have been revoked. No other vote appears to have been had, or other announcement by the speaker made in regard to this bill. No other action was had by the house, except on March 4th, being the last act before adjournment *sine die*, the bill was reported as correctly enrolled, and as having been presented to the Governor for approval. No action was taken on this report, and the bill does not appear to have been reported to the house as having been approved. At the time of the adjournment of the Legislature, therefore, there was an appeal pending, lying on the table, liable to be called up at any time from the very decision of the chair declaring the amendments to be concurred in. Thus, there had been no final action on this question, unless the report of the Committee on Enrollment, without further action thereon, can be so regarded, and the whole matter was still in the control of the house

and unfinished business, when the Legislature was dissolved by adjournment and lapse of time.

At the time the assessment in question was made, then, neither the constitution nor any statute of California gave the defendant any right, or afforded it any legal notice of the proceeding, or opportunity to be heard as to the correctness or propriety of the
142 assessment. The assessment was an arbitrary exercise of power by the State Board of Equalization, according to its own will and pleasure. It is true that in some of the cases, though not in this case, an agent of defendant did appear before the board, after the assessment was made, and sought to get the assessment reduced; and the board, after hearing the application, refused to reduce the assesment, but upon what grounds it does not appear. The defendant offered to show, by the testimony of members of the board, upon what ground the refusal was made, but the evidence was ruled out on the objection of the plaintiff that it was incompetent. As there was no law authorizing such an application or hearing, or authorizing a modification of the assessment by the board upon such application, and the listening to the application was a mere matter of grace, it is the legal presumption that the board acted in conformity with the law and put its refusal up that ground, that it would be unlawful to reduce the amount. But whether it did or not can make no difference.

If such a right and opportuuity to be heard is an essential element of "due process of law," the law must provide for it as a right. The party is not required to accept the boon by the favor or good nature of the officers. And as the proceeding would be wholly without the pale of the law, it will not be presumed that the board would act with that nice regard to judicial fairness, or that proper sense of judical responsibility, that would characterize their proceedings when acting wholly within the limits of their official duties as imposed upon them by law.

Third. The next question is whether the provision of the State constitution, under which the assessment in question was made, is in conflict with the clause of the Fourteenth Amendment to the National Constitution, which provides that no State "shall deny to any person within its jurisdiction the equal protection of the laws." In order that my views on this point may be presented in a con-
143 nected, unbroken order, I shall adopt the reasoning contained in the discussion of the fifth point of my opinion in the San Mateo case, with such additional observations, incorporated at the proper places, as occur to me, illustrative of the views entertained. In the forcible and accurate language of Mr. Edmunds, which I cannot improve, the "Fourteenth Amendment was a new Magna Charta that was in fact, in form, and in effect a fundamental security to every person in the State in respect of every private right that could be invaded; and an absolute affirmation of equality of civil rights to all persons before the law. The first clause forbids the State to touch life, liberty, or property without due process of law; and the second forbids that even with due process of law any person shall be denied the equal protection of the laws. This is the plain letter

of the amendment. It is its intrinsic and beneficent spirit, and it was its purpose." * * *

"What, then, is equality of protection? A civil right under a government is a distinct thing from a political right in it; thus a State may deny to females the right to vote, but it cannot deny to them the right to sue in courts or impose on their property all the burdens of the community. To hold otherwise would lead to the affirmation of the right of the State to make race or color or religion or age or stature the criterion of civil rights, and to exert the absolute right of confiscation by classes or descriptions; for, in such a case, every person of that class or description would stand on an equality with his fellow-victims."

"It is not denied that a State may classify the persons who are to perform certain public duties or bear certain public burdens, based upon personal peculiarities of either sex or calling, etc., as to require military service only from males, or to exempt females from a poll tax, and impose license tax upon certain trades, or tax all franchises of corporations and their special privileges; but it could not impose a poll tax on one-half its male or female citizens that it did not impose on the rest in like degree. And when we come to the case of property, as prop-
144 erty, to be affected by a tax, or any other imposition imposed upon it as a thing of value, a distinction cannot be made to depend upon character or occupation or quality or any individual characteristic of the citizen. To hold otherwise would be to set up the very essence of tyranny and arbitrary power."

"'Equal protection' is the same protection under the same circumstances; all are to stand alike in like intrinsic conditions. Holding property as property is certainly a like intrinsic condition. In the administration of justice, if the criterion of a right to sue be value, all must have the same right when the same value is concerned; or, if the criterion be the nature of the controversy, all must have the same right whose cases are of the same nature. This appears to be too clear for discussion."

"So, too, in the matter of taxation; if the tax, as in this case, be laid upon the values of property, all persons must stand on the same footing, according to the value of their respective property, as to the proportionate burden they are to bear in respect to the value."

"The farmer must be assessed at the same rate for the value of his land as the lawyer for the value of his land, and he must have the same right of notice and hearing, etc., as his fellow citizens of other callings, and if deductions are provided to be made from values on account of debts (which is only a method of reaching effective value) of one class of citizens, they must be made from those of other classes, without reference to what particular characteristics as citizens or persons they may have, as sex or race or age or quality or calling."

"The basis of the imposition being property, as such, the fact that certain property is owned by a corporation or a white man or man of bad character or a clergyman, cannot be made the ground of a levy, that, both in form, in fact, and in result, is unequal and injuri-

ous. Any other doctrine necessarily implies that the State
145 may carry such unequal exactions to the end of complete confiscation by edict of all the property of any class or man, who, during the passion of the hour, may not be in the sunshine of popularity."

It is insisted that the constitutional provision under which the tax in question is levied does not deny to the defendant the equal protection of the laws, and it is sought to maintain the validity of the provision on the ground that it is a proper exercise of the principle of classification—that the property is classified according to its condition and use—and on that ground properly taxed upon a basis different from that applied to other property. The provision to be considered is as follows:

"A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroad and other *quasi*-public corporations, in case of debts so secured the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof in the county, city, or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of such security the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof: Provided, that if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year."

146 Whatever the property, then, real or personal, mortgaged to secure a debt, the value of the debt so secured, in the case of everybody, "except a railroad and other *quasi*-public corporation," is to be deducted from the value of the property mortgaged, and the value only of the property mortgaged, "less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof." That is to say, that the property is to be divided between the parties according to the value of their respective interests, and whatever the nature or extent of the interest of each in the property may be, it shall be taxed to the real owner. But in the case of "a railroad or other *quasi*-public corporation," there is to be no reduction of the value of the mortgaged property—no division according to the interests of each—and the whole is to be taxed to one party, although he, in reality, does not own the whole. In one case, if property is mortgaged to the extent of half its value, the owner is taxed upon one-half the value, and the owner of the debt secured, or the mortgagee, is taxed upon the other half. But in the other case, the owner

of the legal title to the property is assessed and taxed upon the whole value of the property, and the other party, who is interested to the extent of one-half, upon none. A, a natural person, or even a corporation other than one of the excepted class, has $50,000 in cash—all the property he has—and purchases of B, another natural person, a piece of real estate for $100,000, that being its actual value, paying one-half down, and giving a mortgage for $50,000 to secure the balance of the purchase-money. The constitution in effect says—and in this instance such is the real substantial state of facts—that A and B each has $50,000 in the property, one-half not having been paid for by A, and each shall be assessed and pay a tax upon his own interest in it, amounting to $50,000. A, in this instance, is worth only $50,000, and if he pays taxes upon a larger amount
147 he pays taxes upon property he does not really own—upon property owned by somebody else. This seems to be a self-evident proposition.

C, "a railroad, or other *quasi*-public corporation," also has $50,000 cash, and purchases of B, for its proper use, an adjoining piece of real estate for $100,000, which is also its actual value, paying $50,000, and giving a mortgage to secure the balance of the purchase-money. In this case, as in the other, the actual interest of each in the property is $50,000. They stand precisely upon the same footing in all particulars with reference to the property. C has only $50,000 in the property—it not having paid for the other half—and B the rest. But in this case the constitution says that C shall, nevertheless, be assessed for and pay taxes upon the whole property, double the amount he really owns, and B shall not be required to pay anything. That is to say, that C shall not only pay the tax on its own property, but the tax upon B's property; that money, to the amount of the tax assessed upon $50,000, belonging to B, shall be taken by the State or county from C, and appropriated to the use and for the benefit of B, to liquidate B's share of the public burdens. This sum, being so much more than C's share of the public burdens, and being in fact B's share, the result of the operation is, not only to take so much property from C, for public use, without compensation, but also to arbitrarily take it from C, and apply it to the use and benefit of another private party. B, without compensation. The result would be the same, whether the property of A, B, and C, thus situated and mortgaged, is land, a railroad operated in one or more counties, or any other kind of property.

Does a law which authorizes such proceedings—such discriminations—bear or press equally upon A and C, or equally upon B and C? Is C equally protected in its rights of property with A, or equally protected with B, or equally with all other natural persons, or all corporations other than railroad or other *quasi*-public corporations?

Although situated precisely alike with reference to their prop-
148 erty, do they feel the pressure of the public burdens equally and alike? The question does not appear to me to admit of argument. Upon the very statement of the proposition it seems to me to be self-evident that a law authorizing and requiring such proceedings does not afford, but expressly denies, the equal protection

of the laws. The constitution in the one case says that "the mortgage, deed of trust, contract, or obligation" shall be "deemed and treated as an interest in the land affected thereby," which, in the cases supposed, together with the debt secured, it undoubtedly, in fact, is; but, in effect, the constitution says it is not so in the other case. Different kinds of property may require to be taxed in different forms and modes, in order to be equally taxed. And classifications of property for purposes of taxations should have reference to the just equality of burdens, so far as that is practically attainable. Classification should have reference to the different character, situation, and circumstances of the property, making a different form or mode of taxation proper, if not absolutely necessary. It cannot be arbitrarily made, with mere reference to the nationality, color, or character of the owners, whether natural or artificial persons, without any reference to a difference in the character, situation, or circumstances of the property. Should second mortgages foreclose a mortgape on a railroad or other property of a "railroad or other *quasi*-public corporation," and a natural person become the purchaser of the road or other property subject to the prior mortgage, at the next annual assessment the amount of the first mortgage bonds or indebtedness secured would be deducted from the value of the road or other property, and the amount of the bonds or other indebtedness assessed to the mortgagees. Such, also, would be the result in the case before supposed if C—a railroad or other *quasi*-public corporation—should convey its land to a natural person, subject to the mortgage to B; and although there would be no change in
149 the condition, circumstances, use, or value of the property—the change being only in the owner—C's grantee would only be required to pay one-half the amount of taxes which C had been compelled to pay, and B, who before paid nothing, would be required to pay the other half. Should the Southern Pacific railroad and its lands pass into the hands of a natural person upon a foreclosure and sale, under a second mortgage, subject to the mortgage now on them, the value of this very security would be deducted from the value of the property at the next annual assessment. Thus, although the property would in all respects be the same, and similarly situated, and applied to the same uses—for natural persons as well as corporations may own and operate railroads—a mere change in the ownership would require and effect an entire change in the mode and basis of the assessment, and the amount of taxes levied on the owner. Nothing, it seems to me, could more clearly demonstrate the unsoundness of the proposition, that only an admissible classification of property for the purposes of taxation is involved in the different schemes provided for taxing the property of "railroad and other *quasi*-public corporations," and the property of natural persons and of other corporations. Railroad and other *quasi*-public corporations are not even put upon the same footing with other corporations, the latter being placed upon an equality with natural persons. A mere change of ownership under the provisions in question largely affects the amount of taxes paid by the owner upon the same property, without any change in the character, condition, value, use, or cir-

cumstances of the property itself. A provision that a black man shall pay double the amount of taxes paid by a white man on the same kind of property similarly situated and used, or upon the identical property, in consequence of a mere change of ownership from a white man to a black man, might with as good reason be sustained on the principle of classification invoked. The classification in this case is clearly by ownership, and not by condition or use.

150 That natural persons may own and operate a railroad in this State as well as corporations is manifest from the fact that this road is mortgaged under the authority of the laws of the State, and this of itself necessarily involves the power to sell and convey, in case the occasion arises, under a decree of foreclosure, to any party who is willing to pay the highest price for the road. It also appears as a fact in this case that a natural person purchased a railroad operated in more than one county, extending from Marysville, in the county of Yuba, to Oroville, in the county of Butte, under a decree foreclosing a mortgage, received his conveyance therefor, and that he has been operating it and been assessed, and has paid taxes upon it for more than two years past. So, also, numerous statutes of the States were introduced in evidence, granting the right to natural persons, not incorporated, to build and operate railroads. "An act to provide for the construction of a railroad from Mokelumne City to Woodbridge, in the county of San Joaquin" (Statutes 1862, page 97), and an act authorizing the building of a railroad from the Embarcadero, on the bay of Petaluma, in Sonoma county (*Id.*, 295), are examples of numerous acts of a similar character found scattered through the volumes of the statutes from that time to the present. Thus private parties owning and operating railroads covered by mortgages, and situated in all respects precisely as railroad corporations are situated with respect to the same kind of property, would only be required to pay taxes upon the excess of the value of the road or other property over the value of the security, while the holder of the security would be assessed for and pay the taxes on the value of the security. The personal liability of each would only extend to the tax on his own interest, and, in many instances, the value of the security would equal the whole value of the property, thereby relieving the mortgagor of all taxes on the property. This is not classification, therefore, by its condition or use, for the purposes of taxation at all, but by ownership.

151 There is no difference in the rate imposed; it is taxed according to its value, like all other property; no more, and no less tax, in the aggregate, is levied. It is, therefore, taxed upon the same principle as other property; no more and no less revenue is raised by the classification. The State is not benefited. The burden is simply taken from the owner and thrown upon one who does not own the property taxed. It is not taxed to and made a personal charge upon the owner as other property is under like circumstances. This is the only difference, and that does not affect the principle of the taxation. Unless it is competent to class the

property of Jones, whether land, or railroad, or other property, when mortgaged, as belonging to Smith, and compel Smith to pay the taxes as a personal charge or liability imposed upon him on the property of Jones, who is not to be taxed or charged upon the property at all, when the same thing is not done as to other property of like kind and similarly situated, then this provision of the State constitution cannot be maintained on the principle of classification or any other. The interests of the mortgagor and mortgagee are not the same—not identical. The estate of one begins where the estate of the other ends. They both together, under that clause which makes the mortgage in all cases, as it does in terms, an interest in the lands for the purpose of taxation, make up the whole, so far as classification for the purpose of taxation is concerned.

Suppose the position of the parties, the mortgagor and mortgagee in this case, in regard to the imposition and payment of the tax had been reversed, and the constitution had imposed the tax upon the whole as a personal charge upon, and compelled payment by, the mortgagee—the holder of the security—instead of upon the mortgagor, the mortgagor not being taxed at all, would such a provision have been valid upon the principle of classification, or any other? Would the mortgagee stand upon
152 the same footing with other mortgagees? I apprehend that such a provision would not stand for a moment in the presence of the provision of the National Constitution assuring to all the equal protection of the laws. Such a provision would not operate equally upon the two parties interested in the property, nor upon the mortgagee thus taxed, and other parties in like circumstances, where the mortgagors are natural persons, or other corporations, who are only compelled to pay taxes upon the interests in property which they actually own. If the holder of the security could not be taxed for the interest held by the owner of the railroad, land, or other property mortgaged, no sound reason is apparent for holding that the mortgagor can be taxed for the whole, and especially where, as in this particular instance, the value of the security is greater than the value of the estate of the other party. There cannot be one law for one person and a different and more onerous law for another similarly situated, and both enjoy the equal protection of the laws in the particulars wherein such laws differ.

Conceding the Fourteenth Amendment to apply to taxation, as it undoubtedly does, I think I hazard little in saying that no possible reasoning can justify such classification or discrimination under it. That classification, upon such principles, is arbitrary, tyrannical, and unjustifiable.

There can be no valid classification of property under the State constitution for the purposes of taxation, based upon the uses to which it is applied, except so far as the use may give additional value to the property; and the principle under the constitutional provision requiring all property to be taxed at its value would only authorize the increase or modification of the assessment by adding the increased value so arising from the use. One owner may pasture his land, another raise wheat, cotton, or sugar cane, another plant a

vineyard for the production of wine, or an orange grove,
153 another erect buildings upon his land, and enjoy the rents therefrom, and another devote his to the construction and operation of a railroad. If any of these uses give additional value to the land or other property, it must be taxed at its actual value, be it greater or less. But under the constitutional provision requiring all property to be taxed at its actual value, it cannot be classified by its uses for the purpose of applying other principles of taxation than value as a basis, or for the purpose of taxing it according to ownership, so as to make one class of owners, as such, pay more than another, or one class of owners pay the taxes that ought to be assessed against and paid by another class. The State constitution does not profess to classify upon the basis of the uses to which property is applied. It recognizes no such principle in terms or by implication. It says nothing about uses, but classifies in terms by ownership, and includes all the property of the same owners in its class for non-deduction of the value of the security—land and other property held for sale, as well as property used for operating railroads, or other corporate uses of *quasi*- public corporations—without making any reference whatever to its uses. The only rule by which any property is authorized to be assessed is according to its value. The constitution arbitrarily provides, as to a particular class, that they shall pay the taxes upon the interest—according to the constitutional definition of property—in the property held by another class of owners who are allowed to escape taxation altogether, and in this particular the laws do not bear upon or protect the former equally with the latter. It provides that railroads and other *quasi*-public corporations shall pay taxes upon property they do not own—shall pay other people's taxes. This discrimination against such corporations is not a taxation but a confiscation of their property, not for the benefit of the public, for there are no more taxes collected in the aggregate, but for the benefit of other property owners, who thereby escape their share of the public burdens. If the arbitrary discrimination and classi-
154 fication found in this case can be legally made under the National Constitution and the law of the land, then the subordinate State constitution or law can be so framed as to dispose of a man's rights in property of all kinds by arbitrary classification and definition, without regard to the real facts, circumstances, or condition of the property. A person may, by such subordinate statutory provisions, be classified and defined out of the equal protection of the laws guaranteed by the National Constitution; and, if so, with reference to this provision, he can also be classified and defined out of uniformity in the operation of the laws in other particulars; out of the protection of due process of law and of the provision forbidding a law impairing the obligation of contracts or taking property for public use without just compensation; and, indeed, out of all the guaranties of the constitution, State or national. I am not arguing that property of all kinds may not be taxed where it is found, provided all owners are put upon the same footing; but in this case there is a personal liability sought to be enforced against the de-

fendant for taxes not imposed upon others in like circumstances, without any means provided for reimbursement, such as are applicable to others similarly situated, by the party who ought to pay the tax.

For authorities, including decisions of the United States Supreme Court, illustrating this point, reference is made to the San Mateo case, 8 Saw., 302–4.

It is argued that the taxing of the whole value of mortgaged property of railroads and other *quasi*-public corporations to the corporation owning it, subject to the mortgage, while the same thing is not done with respect to the property of natural persons or other corporations similarly situated, is valid as being simply a franchise tax—a tax for the privilege of being a corporation, "a tax imposed as a return for privileges and powers not possessed by individuals."

155 It is further said that it is not material by what standard a franchise tax is measured, whether the tax is in gross or measured by receipts, the amount of property acquired, or by any other standard, and cases are cited from some of the States where a franchise tax is claimed to have been sustained on such principles. But this view wholly ignores the provisions of the State constitution itself on the subject. This is not and does not purport to be in any sense a franchise tax. A franchise tax is otherwise in express terms provided for. The constitution itself prescribes how a franchise tax shall be assessed, and that is, like all other property, "in proportion to its value." "All property * * * shall be taxed in proportion to its value, to be ascertained as provided by law." (Art. XIII, sec. 1.) "The word property, as used in this article and section, is hereby declared to include money, credits, * * * franchises, and all other matters and things * * * capable of private ownership." (*Ib.*)

Again, "the franchise, roadway, etc., of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization at their actual value." (*Ib.*, sec. 10.) Thus the franchises of the defendant, under the constitution of California, can only be assessed like other property, according to "their actual value," be that more or less. Their franchises have, therefore, already been otherwise assessed at their value, all the constitution will allow, and this discrimination is not and cannot be, under the constitution of California, a franchise tax. It has no reference to the franchise. It is simply in law, what it is in fact, an arbitrary and unjustifiable discrimination against railroad and other *quasi*-public corporations that cannot be maintained under the Fourteenth Amendment to the National Constitution, guaranteeing to every person the equal protection of the laws.

Great stress was laid in the arguments of plaintiff's counsel upon the growing and overweening power and greed of corporations, and it was vehemently asserted that this is a struggle between the people

156 and the corporations for supremacy; that corporations, by corrupt means, and through their large and widespread influence, have obtained, and they are obtaining, control of legislatures, etc., etc.

If this be so, then it is of the utmost importance to every natural person in the United States that these guaranties of the Fourteenth Amendment to the National Constitution should be maintained in all their length and breadth. They are the only means of protection left to the people. If these unequal taxes can be imposed upon the class of corporations named in the constitution, the position of the parties can be reversed, and the unequal tax now thrown upon the corporations may hereafter be imposed upon the other parties. If these can be taxed without a hearing, then all or any class of persons can be taxed without a hearing; and if there is good ground for the alarm manifested by the counsel of the plaintiff, such corporations, when they acquire the deprecated power and control indicated, will not be likely to be slow in shifting the unequal burden to the other side. There is, therefore, upon that hypothesis, no safety to the people, except in most rigidly maintaining the guaranties of the Fourteenth Amendment in their broadest scope.

Fourth. Upon the point as to whether the provision of the State constitution under which the tax in question was levied is valid, by virtue of the power of the State over corporations, under the authority reserved to the State under the constitution to amend, alter, or repeal the laws under which they were organized, or otherwise, I refer to the quite full discussion of the point under the sixth head in my opinion in the San Mateo case, 8 Saw., 304. I shall, however, make some additional observations.

In order to sustain the validity of the tax on that ground the constitutional provision must operate as an amendment to the general statute of California, by which it imposes upon railroad and other *quasi*-public corporations, under the amended statute, as a condition of their continued existence, a liability to be taxed otherwise than as natural persons and other corporations are taxed. It is not pretended by anybody that any express intention to
157 amend the act relating to corporations is found in the new constitution, or that any reference is anywhere made to the act. The operation of the amendment of the statute is sought to be worked out by implications and the necessities of the case, which require the tax to be sustained on that ground, as there is no other on which it can rest. But repeals or amendments of statutes by implication never were favored; and, under our constitution, limiting the power of the Legislature to the passage of acts embracing but a single subject, which must be expressed in the title of the act, and forbidding an amendment otherwise than by re-enacting the whole section as amended, would seem to render the rule still more restrictive in its operation. No reference to this matter of taxation is made in any part of the chapter devoted to corporations. The provision is found in the chapter providing for taxation, and which deals with taxation, and only taxation, as taxation. It is manifest that the idea of amending the act relating to corporations was never contemplated by the convention in framing, or the people in adopting, the constitution. We are satisfied that the charge must be sustained, if sustained at all, only as a tax, without reference to the power of the State to impose further conditions upon corporations

not imposed at their creation by amendment to the general laws under which they became incorporated.

But if the State, under its power to amend the laws under which corporations are formed, is entitled to impose this charge, not imposed upon natural persons and other corporations under like circumstances, as a condition of its continued future existence, the corporation is not bound to accept the condition and go on. No charter can be forced upon an association of natural persons, and no new or more onerous conditions can be forced upon a corporation already formed. It may elect to dissolve and retire from the field of enterprise occupied rather than accept the new conditions, and such conditions might be imposed
158 as would compel that course. But until accepted they form no part of the charter, and impose no new valid obligations. An acceptance of the new conditions cannot be presumed while the corporation is protesting that none have been imposed; or, if attempted to be imposed, is insisting that they are invalid, void, and of no effect—and in every way, and by all means in its power, is resisting the attempt of the State to give effect to this assumed change in its rights and obligations—while it is still denying the power of the State to make the change and refusing to acquiesce in it. Till the corporation elects to accept the new conditions imposed, or gives some evidence of such election, rather than dissolve, there is no implied promise or obligation to assume the additional burdens laid upon it, or, as in this instance, to pay the additional tax thus imposed *in invitum*, upon which an action can be maintained. This corporation, like every other person, against whom a right is claimed, certainly is entitled to litigate the question, whether any new valid obligations or conditions have been imposed upon it, before it can be called upon to determine whether it will dissolve and retire, or accept the conditions and proceed. A refusal to accept, surely, can give no right of action, which depends upon acceptance. If there is any remedy in behalf of the State against a corporation declining to accept, but still continuing to exercise its functions in violation of the existing law, it is by some proceeding in the courts, in the nature of an information, to dissolve the corporation and wind up its affairs; and this, it appears to me, is the remedy in this case, if there is an amendment to the act under which the defendant is incorporated, imposing the liability of this unequal and unjust tax upon it, as a condition of its continued existence, and the corporation refuses to accept it, or to submit to it.

The doctrine asserted, and sought to be maintained, that because a corporation owes its origin and existence to the State—
159 is a creature of the State—it and all its belongings are under the arbitrary power and control and at the absolute mercy of the State, is monstrous. The State, through general laws applicable to all similar corporations, may abolish corporations, may take away their faculties, may enlarge or restrict their powers and functions for the future; but it cannot lay its hand upon their lawful acquisitions or property, otherwise than as upon the acquisitions and property of natural persons. Although the title and

management of these are vested in the ideal being called a corporation, the ultimate property is in the corporators, and their rights in the property and acquisitions are as sacred in their corporate as in any other of their relations to society, or to the State.

Had the State constitution provided that the property of corporations might be taken for public use without any compensation, and without a trial or hearing of any kind, such as for the sites of public buildings, public streets or squares, or for the use of railways, and the corporations had denied and resisted the validity of such provision, I apprehend that no court would hold that because it did not immediately dissolve and retire from business, upon the adoption of such a provision, that it had been accepted, and thenceforth become one of the conditions of the future continued existence of the corporation, and in consequence of the fact that its property might thenceforth be arbitrarily taken and appropriated to public use without any hearing or compensation. Yet such a provision would be more monstrous than the doctrine sought to be maintained. Indeed, it is the necessary logical sequence of the doctrine.

From these considerations, and those expressed upon this point in the San Mateo case, and from the expressed terms of the constitution itself, it is clear to me that the provision in question attempts to provide only for exercising the sovereign power of taxation—has no other end to accomplish and accomplishes no other pur-
160 pose; and that the rights of the parties must be determined on that hypothesis alone—that is to say, the hypothesis that it is a tax merely, without any reference to a change of the fundamental conditions upon which the corporation is to continue in existence. If not, then that the new conditions have not been accepted, and there is no ground upon which this action can be maintained The suit is simply one at law for a tax, and nothing else, and the plaintiff must recover on that theory, and on the case made, or not at all. If this tax can be imposed upon the defendant simply because it is a corporation, when it could not be imposed upon natural persons holding, owning, and using its property under like conditions in all other respects, then it would be difficult to point out what rights are left to corporations, or natural persons in their corporate relations, which the State, under the Fourteenth Amendment, or otherwise, is bound to respect.

Fifth. At the time of the assessment and levy of the tax in question there was a deed of trust in existence, and operative, to secure a large indebtedness, executed by defendant to D. O. Mills and Lloyd Tevis, before the adoption of the present constitution of the State of California, which covered the Southern Pacific railroad, its tracks, depots, rolling-stock, and all appurtenances—the road aggregating 1,150 miles in length, of which over 700 are completed and in operation. It also covered all the lands granted by the United States to aid in the construction of said railroad, aggregating, as estimated, 10,000,000 acres, after excluding reserved lands embraced in the statutory description. This deed of trust or mortgage was duly recorded in the several counties of the State

through which the road extended, and in which the lands were situated.

A portion of the road, and of the lands mortgaged, was situated in the county of Santa Clara. The mortgage was for $46,000
161 per mile, of which amount bonds have been issued to the amount of $39,000 per mile. The lands mortgaged, so far as they have been patented, including the lands in Santa Clara county, have been taxed to defendant in the several counties in which they were situated, at their full value, and without any reduction on account of the mortgages, and the taxes duly paid. So, also, no reduction in the amount of the assessed value of the road, rolling-stock, etc., was made in consequence. Thus all the property embraced in the mortgage was taxed to the defendant at its full value, without any reduction in the amount on account of the mortgage. The trust deed contained the following covenant: "And the said party of the first part hereby agrees and covenants to and with the said parties of the second part, and their successors in trust, that it will pay all ordinary and extraordinary taxes, assessments, and other public burdens and charges which may be imposed upon the property herein described and hereby mortgaged, and every part thereof; and the said parties of the second part, the survivor of them, or their successors in said trust, or any one or more of the holders of said bonds, may, in case of default of the said party of the first part in this behalf, pay and discharge the same, and any other lein or incumbrance upon said property which may in any way, either in law or equity, be or become in effect a charge or lien thereon, prior to these presents, or to which this mortgage may be subject or subordinate, and for all payments thus made the parties so making the same shall be allowed interest thereon at the rate of seven per centum per annum; and such payments, with the interest thereon, shall be, and are hereby, secured to them by these presents, and declared to be payable and collectible in the same sort of currency or money wherein they shall have been paid, and the same shall be payable by said party of the first part to said parties of the second part upon demand, in trust for the party or parties paying the same, and may be paid out of the proceeds of the sale of said property and franchises hereinbefore provided."

162 It is gravely and earnestly insisted here that under this covenant the defendant has bound itself to the trustees to pay the whole taxes assessed upon the property covered by the mortgage; that if the tax should be assessed upon defendant, and there should be a recovery in this case and payment of the judgment, the defendant would pay no more than it is bound to pay under the covenant in the trust deed, and could not be injured; therefore the tax is valid, and a recovery should be had in this action even though the tax, as levied against the defendant, is unauthorized by any valid law, or was levied without the authority of any law. It would seem to be only necessary to state the proposition to make manifest its fallacy. The proposition in substance is, that if a valid tax had been levied the defendant had bound itself by a contract to protect the third party, with whom the plaintiff is not in privity against it, by pay-

ment, or allowing such third party to pay it and make it a secured charge against defendant. And since this is so, although it is not authorized by any valid law, it would not injure the defendant to levy the tax against it and compel it to pay the whole amount of tax that ought to have been properly levied on somebody on account of the property. Therefore the plaintiff ought to recover, although there is no valid tax levied against him or anybody else—no tax for which anybody is now legally liable. Somebody ought to have been made personally liable to pay this tax by a proper and legal assessment of it, and if anybody had been made liable defendant would have been bound to pay it under its covenant; but there was no valid assessment, either against the defendant or anybody else. yet the defendant is personally liable, and plaintiff ought to recover. Such is the reasoning presented to us.

This tax, as levied, is either valid as properly levied under the law, or it is void, and its validity must depend upon the law. It cannot depend upon the fact that private parties by an ante-
163 rior contract, with which the State and county are not in privity, had a stipulation as to which should pay any tax properly levied. If valid as against defendant so as to make it personally responsible, then the plaintiff is entitled to recover, whether it would be injured or not, and there is no need to invoke the principle that defendant cannot be injured by doing what it in good morals ought to do. If the tax as levied is not valid and a legal personal charge upon the defendant under the law, without regard to any contract between private parties as to who shall pay a valid tax upon the land when levied, then there is no valid tax or personal charge against anybody, for no tax purports to have been levied against the trustees in the trust deed, or against the holders of the security. There is no tax upon which the covenant can operate. This action is not based upon moral equities, or even upon equities recognized and enforced by courts of equity. It is a dry action at law to recover what is alleged to be a sum of money legally due, and for which the defendant is legally personally liable, by reason of a valid levy of a tax against it. That is the cause of action alleged, and upon that a recovery must be had, if at all, and according to the *allegata* of the complaint. This is not a suit in equity to enforce a lien for a tax. It is not an application for an injunction against the collection of the tax, in which, possibly, the court might consider whether there were any equities which should call upon it to deny the injunction or relief affirmatively sought. It is not a case for the exercise of discretion. It is an action resting upon a strictly legal personal liability. It is not enough that a valid tax to some extent might have been levied. There must be such a tax as throws a legal liability upon the defendant to pay to the plaintiff the sum claimed, or there can be no recovery. But had there been a valid tax levied against the covenantee, or mortgagee, on account of the property, this would not have au-
thorized a recovery against defendant by reason of the cove-
164 nant alone. The covenant cannot affect the case. The covenant was between the defendant and the trustees, for the

benefit of the latter, or rather the bondholders secured, and not for the benefit of the plaintiff. The plaintiff is not in privity with them. But suppose the covenant had been between defendant upon a due consideration, and the trustees, expressly made for the benefit of the plaintiff, in such form, if such could be, as to give plaintiff a right of action on the covenant. It would be necessary to set out the contract on which the right of action rested, and make it the basis or ground of action. Nothing of the kind has been done. The theory of this action is, that a valid tax has been legally assessed against defendant, for which it is personally liable under the constitution, and a recovery is sought on that ground in the complaint, and upon no other; and it can be had upon no other.

There were two kinds of covenants in use in mortgages and trust deeds at the time the trust deed in question was executed; one a covenant that the mortgagor would pay all taxes that might be assessed on the mortgaged property, and, in default of payment, that the mortgagee might pay it himself for the protection of his security, and upon such payment that the taxes so paid should be added to the debt and draw like interest. This was simply to protect his security against other parties who might subsequently acquire liens, and to convert his advances into principal and fix the rate of interest. The purpose of this covenant was not to render the mortgagor liable to pay a tax which he was not already liable to pay, but it was to enable the mortgagee to pay it for his own protection in case the mortgagor did not, and take away the voluntary character of the payment, so that he could convert it into a secured debt, drawing interest as a part of the principal. The other was that the mortgagor would pay not only all the taxes levied on the mortgaged property, but also all taxes that should be levied
165 upon the moneys loaned and secured. This was an indirect way of increasing the interest paid on the loan, and imposed an additional burden upon the mortgagor. This last covenant is now forbidden and rendered void under the new constitution.

The covenant in the mortgage in this case is clearly of the first kind. It only required the mortgagor to pay the taxes or liens which it was at that time bound to pay without the covenant, and in no way extended its liability. A law, or constitutional provision, which should compel him to pay the taxes assessed upon the property of the mortgagee would enlarge his liability beyond that covered by his covenant, and be void. This covenant only extended to taxes for which the defendant was already liable. Besides, if no valid tax has been levied, then the case is not within the covenant, for the defendant cannot be called upon under the covenant to pay a tax absolutely void.

Again, suppose the covenant had been in a mortgage or trust deed between two natural persons, made at the same time, the sum secured being the whole value of the property. Under the constitutional provision in question, the value of the security, which, in the case supposed, is the whole value of the property, must be assessed to the holder of the security and made a personal charge on him alone. It could not be assessed to the mortgagor and made a personal

charge or liability on him, and enforced by a suit for a personal judgment, because there is no statute or constitutional provision purporting to authorize such a proceeding. Yet he has covenanted with the holder of the security in the same sense as in the trust deed in question, to pay the whole tax levied on the land, and he would not be injured, according to the theory of the plaintiff, if the whole tax should be assessed and recovered against him. If such assessment should be made against the mortgagor instead of the mortgagee without any law for it, or even purporting to authorize it, and a suit be brought to recover a personal judgment for the amount, I
166 apprehend that no counsel would be found bold enough to urge that the utter invalidity of the tax is no defence against the suit, for the reason that if a proper tax had been levied against the proper party he would be bound by his covenant with that party for the protection of that party's interest alone to pay the tax, and, therefore, he is not injured. If such an action under such circumstances could not be maintained against the mortgagor, then it cannot be maintained against the mortgagor in this case; otherwise there is one law for this defendant and another law for natural persons occupying in all respects, with reference to their property, precisely the same situation; and there is a manifest denial of the equal protection of the laws in this particular as well as in the others. They are not equal before the laws. If the constitutional provision in question is void, then there is no law under which this tax could be levied against defendant, and it is utterly void and cannot form the basis for a recovery. In my judgment the provisions of the State constitution, upon which the validity of this tax and the right to recover alone rest, violate the provisions of the Fourteenth Amendment in question in four vital particulars:

1. They assess railroad and other *quasi*-public corporations upon a different basis from that adopted with respect to natural persons, and other corporations similarly situated with respect to their property in the particulars in these opinions, and in the opinions in the San Mateo case pointed out.

2. They provide, with respect to all property other than railroads operated in more than one county, an opportunity to be heard in the course of the proceeding, to assess their property before the assessment becomes irrevocably fixed, while they afford no such notice or opportunity to be heard with reference to railroads operated in more than one county, and, in both these particulars, deny to the defendant the equal protection of the laws within the meaning of the Fourteenth Amendment to the National Constitution.

167 3. In not affording notice and an opportunity to be heard before the tax becomes finally and irrevocably fixed, they deprive the defendant of its property without due process of law.

4. In assessing a tax and enforcing it as a personal liability against defendant, upon property which it does not own, but which is owned by other parties who pay no tax upon it, the defendant's property, to the extent of the amount taken beyond his proper share of the public burden, is taken for public use, both without due process of law and without compensation.

As there must be judgment for defendant upon the points arising under the National Constitution, it is unnecessary for us to extend these opinions by examining the questions arising alone under the State laws and constitution, over which we would have had no jurisdiction, but for the fact that the questions already discussed are in the case. Those are questions more properly belonging to the State courts. We have found the facts in the case, however, and if it should turn out that we are in error upon the points decided, the Supreme Court will be called upon to decide those questions also. If we are not in error, then those questions will, doubtless, be left to the State courts, where they properly belong.

For the reasons herein, and in the opinion of the presiding justice stated, in addition to those given in the several opinions delivered in the San Mateo case, I think judgment should be rendered for defendant as directed.

September 17, 1883.

Endorsed: Approved, and official opinion read in open court, September 17th, 1883. L. S. B. Sawyer, clerk.

168 *Bond on Writ of Error.*

In the Supreme Court of the United States.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff in Error, *vs.* THE CENTRAL PACIFIC RAILROAD COMPANY, Defendant in Error. } No. 2845.

Know all men by these presents, that we, Michael Scholl and Louis Marshall, are held and firmly bound unto the Central Pacific Railroad Company, defendant in error herein, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said The Central Pacific Railroad Company, its successors or assigns, to the payment of which well and truly to be made we bind ourselves and each of us jointly and severally, and our
169 and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals; dated the 7th day of July, 1884.

Whereas the above-named The People of the State of California has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the circuit court of the United States of America for the district of California, in the cause entitled The People of the State of California, plaintiff, *versus* The Central Pacific Railroad Company, defendant (No. 2845):

Now, therefore, the condition of this obligation is such that if the above-named The People of the State of California, plaintiff in error, shall prosecute its said writ of error to effect and answer all costs, if

it shall fail to make good its plea, then the obligation shall be void; otherwise to remain in full force and virtue.

170 MICHAEL SCHOLL. [SEAL.]
LOUIS MARSHALL. [SEAL.]

Signed, sealed, and delivered in presence of—
L. S. B. SAWYER.

UNITED STATES OF AMERICA, *District of California,* } *ss:*

Michael Scholl and Louis Marshall, being duly sworn, each for himself deposes and says that he is a householder in said district, and is worth the sum of five hundred dollars in lawful money of the United States of America, exclusive of property exempt from execution and over and above all debts and liabilities.

MICHAEL SCHOLL. [SEAL.]
LOUIS MARSHALL. [SEAL.]

Sworn to before me this 7th day of July, 1884.
L. S. B. SAWYER,
Com'r U. S. Circuit Court, Dist. Cal.

171 Endorsed: The form of the within bond and the sufficiency of the sureties thereon are hereby approved. (Signed) Lorenzo Sawyer, U. S. circuit judge 9th circuit. Filed July 7, 1884. L. S. B. Sawyer, clerk.

172 In the Circuit Court of the United States for the District of California.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY. } No. 2845.

I, L. S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit, in and for the district of California, do hereby certify that the foregoing one hundred seventy-one written and printed pages, numbered from 1 to 171, inclusive, are a full, true, and correct copy of the record and of all proceedings in the above-entitled cause, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of said circuit court, this
173 22d day of July, A. D. 1884.
[SEAL.] L. S. B. SAWYER, *Clerk.*

174 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of the ninth judicial circuit in and for the district of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before

you, between The People of the State of California, plaintiff in error, and The Central Pacific Railroad Company, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 7th day of July, in the year of our Lord one thousand eight hundred and eighty-four, and of the independence of the United States the 109th.

[SEAL.] L. S. B. SAWYER, *Clerk.*

The above writ of error is hereby allowed.

LORENZO SAWYER,
Court Judge.

175 *The Answer of the Judges of the Circuit Court of the United States for the District of California.*

The record and all proceedings of the plaint, whereby mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States of America within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[SEAL.] L. S. B. SAWYER, *Clerk.*

[Endorsed:] No. 2845. United States Supreme Court. The People of the State of California, pl'ff in error, *vs.* The Central Pacific Railroad Company, def't in error. Writ of error. Filed 10 July, 1884. L. S. B. Sawyer, clerk.

176 UNITED STATES OF AMERICA, *ss:*

To the Central Pacific Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1884, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States and for the district of Cali-

fornia, wherein The People of the State of California is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lorenzo Sawyer, judge of the circuit court of the United States for the district of California, this 7th day of July, A. D. 1884, and of the Independence of the United States the 109th.

[SEAL.] LORENZO SAWYER,
Circuit Judge.

177 [Endorsed:] No. 2845. United States Supreme Court. The People of the State of California, pl'ff in error, *vs.* The Central Pacific Railroad Company, def't in error. Citation. Service of a copy of the within citation is hereby acknowledged July 9, 1884. H. S. Brown, att'y for def't in error. Filed 10 July, 1884. L. S. B. Sawyer, clerk.

Endorsed on cover: California C. C. U. S. No. 984. The People of the State of California, plaintiff in error, *vs.* The Central Pacific Railroad Company. Filed 3d October, 1884.